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PRINCIPLES
OF
THE COMMON LAW.

PRINCIPLES
OF
THE COMMON LAW.

**AN ELEMENTARY WORK INTENDED FOR THE USE
OF STUDENTS AND THE PROFESSION.**

BY

JOHN INDERMAUR,
SOLICITOR,

AUTHOR OF 'MANUAL OF PRACTICE,' 'EPITOMES OF LEADING CASES,' ETC., ETC.

SECOND EDITION.



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PREFACE TO SECOND EDITION.

THE author has for a considerable time past been engaged in the preparation of this edition in anticipation of its being required. The scope and idea of the work remains as before, but very great care has been expended in endeavouring to make it thoroughly accurate, and to include all alterations in the law which have taken place since the original publication. In this edition various cases decided in the Irish Courts have been cited, and it is hoped this will tend to render the work of greater utility to the practitioner and student in that country. A good index to any work is of importance, and great pains have been bestowed on the present one.

J. I.

22 CHANCERY LANE, W.C.

June, 1880.

PREFACE TO FIRST EDITION.

THE chief object of the present work is to supply the student with a book upon the subject of Common Law (or, in other words, of the Law as usually administered in the Queen's Bench, Common Pleas, and Exchequer Divisions of the High Court of Justice) which, whilst being elementary and readable on the one hand, yet also goes sufficiently into the subject to prepare the student for examination upon it. The present work is indeed written mainly with a view to the Examinations of the Incorporated Law Society, for which the author has had considerable experience in reading with students; but at the same time he trusts it may be found useful to those who are adopting the other branch of the profession. The author does not consider that any apology is necessary for presenting this work, it being new in its design as offering to the student a comparatively short volume combining the plain and popular divisions of "Contracts" and "Torts," and keeping as much as possible from all matters of practice and from Criminal Law, and also from all matters of an exceptional nature and likely neither to be useful in examination nor in practice. In addition to the two main divisions the author has added another, in which the subjects of "Damages"

and "Evidence" are discussed, as no work on the "Common Law" could be complete without.

Besides his chief object the author has also had another in view, viz. : to produce a book which may—if not always in itself, yet, at any rate, by aid of the extensive references to either text-books or cases—form a work useful to the practitioner. In many cases it may—from its very size—be useful for this purpose only as an index, and remembering this, the author has considered that in many places references to larger text-books would be preferable to cases, and has acted accordingly; and here he would acknowledge the obligations he is under to the learned authors and editors of the various works he has in the following pages referred to.

With these few words the author sends his work forth to speak for itself and be judged on its merits, assuring his readers that no pains have been spared on his part to insure accuracy, and trusting that his labours may meet with approbation.

J. I.

22 CHANCERY LANE, W.C.

August, 1876.

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PRINCIPLES OF THE COMMON LAW.

INTRODUCTION.

THE origin of the Common Law of England, though it cannot be now certainly and surely found, being lost in antiquity, may probably be set down to the customs and usages in the first instance of the early Britons, afterwards amended and added to by those of the Romans and other nations who spread themselves over the country, and being originally of a narrow and limited kind, increasing according to men's necessities, until, in the present highly artificial state in which we live, it has assumed such wide dimensions as to make it difficult to believe in its early foundation. The term "common law" would seem, according to Blackstone (a), to have originated in contradistinction to other laws, or more reasonably as a law common and general to the whole realm, and, used in a wide and large sense, comprehends now not only the general law of the realm but also that given out by statute; and it may be divided as of two kinds, viz : (1) The *lex non scripta*, or unwritten law; and (2) the *lex scripta*, or written law. With regard to the former division in the very ancient times, in consequence of the utter ignorance of the mass of the people, the laws could not be, and were not, reduced into writing, but were to a certain extent transmitted from age to age by word of

The origin of
the common
law.

(a) 1 Bl. Com. 67.

mouth. But this is not all that is included in the *lex non scripta*, which term is indeed used in contradistinction to the statute law, which forms the actual *lex scripta*, for, as is stated by Blackstone (b), now the monuments and records of our legal customs are contained in the books of the reports of the judges from time to time, and in the treatises of the different writers, commencing at periods of high antiquity and continued until the present time. With regard to the latter division, viz. the *lex scripta*, this, as has been said, comprises the statute law of the realm. In the earlier times but little attention was given to the laws, and, indeed, from the essentially warlike nature of the people it was not the greatest requirement; but gradually, as civilization advanced, the *lex non scripta* was found insufficient, or indeed, sometimes contrary to the benefit of the country, and the direct intervention of the legislature was required to amend, alter, and vary, or in some cases to simply declare, the law when doubts had arisen on it. As civilization has progressed and age after age has become more and more artificial, so the statute law has increased, as is evidenced by the multitude of Acts of Parliament necessary to be referred to by the student of our laws.

As to the
advantages
of a code.

It might be interesting, and perhaps useful, to here enter into the consideration of the relative advantages and disadvantages of a code of laws, but such a discussion would be beyond the scope of a work like the present, and the subject must be dismissed with a few remarks. True, there is in our present system of laws the disadvantage, that it involves to master it, deep and intricate study, and requires to be traced back to the earliest times to understand various reasonings; but, on the other hand, though a code would do away with this necessity of historical research, yet it would present law in a much more inflexible state than

(b) 1 Bl. Com. 63.

now, and as no code could be perfect, it is to be feared that doubts of construction and the like would arise and perhaps, therefore, to leave things on their present foundation would be well.

The term "common law" has also been used in contradistinction to equity jurisprudence, which is of later growth, and comprehends matters of natural justice (being other than matters of mere conscience), for which courts of law gave no relief or no proper relief. In the opinion of the author this distinction between common law and equity must always exist, for although the Judicature Acts of 1873 and 1875, to a certain extent, fuse law and equity, and though also the rules of equity are to govern where they have clashed with the rules of law (as will be frequently noticed in the course of the following pages), yet as certain matters were formerly strictly the subjects of cognizance in the Common Law Courts and others in the Court of Chancery, so the like matters respectively are and will be commenced and carried on in the analogous division of the present High Court of Justice.

It is important to have a clear and correct idea of the nature of a person's rights which will entitle him to maintain an action for their infringement. The two main divisions of the present work are into Contracts and Torts. In the case of the infringement of any person's legal rights, i.e. if a valid contract be broken, or a tortious act committed, the other party to the contract, or the person against whom the tort was committed, has a right of action in respect of such breach of contract or tortious act, and even though he suffers no substantial damage, yet he has his right of action. The rule upon this point is, that *Injuria sine damno* will entitle a person to maintain an action, which, plainly expressed, means that when a person has suffered *what in the eyes of the law is looked upon as a legal injury*, he must have a corresponding right of

Common law as distinguished from equity.

Of the nature of a person's right which will entitle him to maintain an action.

Injuria sine damno.

action, even though he has suffered no harm. This is well illustrated by the widely known case of *Ashby v. White* (c), which was an action against a returning officer for maliciously refusing to receive the plaintiff's vote on the election of burgesses to serve in Parliament, and it was held that the defendant having so maliciously refused to receive the plaintiff's vote, although the members for whom he wished to vote were actually elected, and therefore he suffered no damage, yet he had a good right of action, for he had a legal right to vote, and that right was infringed.

Damnum sine injuria.

On the other hand, there are many cases in which a person, although he suffers damage by the act of another, yet has no right of action, *because there has been no infringement of what the law looks upon as a legal right*, and this is expressed by the maxim, that *Damnum sine injuria* will not suffice to enable a person to maintain an action. Thus, in an action of seduction, unless loss of service by the plaintiff is proved, the action cannot be maintained, for though the plaintiff may have suffered damage without the loss of service, yet he has not sustained what in the eyes of the law is looked upon as an injury. The best instance, however, on this point, is perhaps found in the principle that a person may deal with the soil of his own land as he thinks fit, so that if he digs down and thus deprives his neighbour of water that would otherwise percolate through the land, yet although this operates to the great detriment of such neighbour, it does not constitute the invasion of a legal right, and will not sustain an action (d). And if a subsidence be caused by the withdrawal of such underground water the same rule holds good (e). It is merely *Damnum sine injuria*. However, in the words of Mr. Broom, in his 'Commen-

(c) 1 S. L. C. 264; Lord Raymond, 938.

(d) *Acton v. Blundell*, 12 M. & W. 324; *Chasemore v. Richards*, 7 H. L. C. 349.

(e) *Popplewell v. Hodgkinson*, L. R. 4 Ex. 248.

ties on the Common Law,' "in the vast majority of cases which are brought into Courts of Justice, both *damnum* and *injuria* combine in support of the claim put forth, the object of the plaintiff usually being to recover by his action substantial damages" (f). When both *injuria* and *damnum* are combined then, as a general rule, there is always good cause of action except indeed that there is some special reason to the contrary, *e.g.* some ground of public policy or where the act amounts to a felony.

Having, therefore, in these few remarks, endeavoured to introduce the student to the subject of common law, and the nature of the legal right in respect of which a person has a remedy, let us proceed to our first chief subject, viz. that of contracts.

(f) Broom's Coma. 112; and see generally upon the subject discussed above, Broom's Coma. 78-112.

PART I.

OF CONTRACTS.

CHAPTER I.

OF THE DIFFERENT KINDS OF CONTRACTS, THEIR BREACH,
AND THE RULES FOR THEIR CONSTRUCTION.

Definition of a contract, and different divisions of contracts.

A CONTRACT may be defined as some obligation of a legal nature—either by matter of record, deed, writing, or word of mouth—to do, or refrain from doing, some act. *Contracts* are usually divided as of three kinds, viz. :—

1. *Contracts of record*, i.e. obligations proceeding from some Court of record, such as judgments, recognizances, and cognovits.

2. *Specialties*, i.e. contracts evidenced by writing, sealed and delivered.

3. *Simple contracts*, i.e. those not included in the foregoing, and which may be either by writing, not under seal, or by mere word of mouth.

Contracts may also be divided as to their nature into—

1. *Express contracts*, i.e. those the effect of which is openly expressed by the facts; and

2. *Implied contracts*, viz. those which are dictated by the law, as, for instance, if a person goes into a shop and orders goods, his contract to pay their proper value is implied.

Again, contracts are divided, with reference to the time of their performance, into—

1. Executed contracts, and
2. Executory contracts.

Having, therefore, three different divisions of contracts, let us proceed to consider each of them separately; and as to the first division, the most important kind of contracts, technically speaking, are contracts of record, they proceeding from some Court of record, but in a practical sense they may be set down as the least important, for, with the exception of judgments, they are not of constant occurrence, and even judgments, considered in the light of contracts simply, are not entitled to much discussion, although, considered in other ways, they are of great importance. As we have given as instances of contracts of record, judgments, recognizances, and cognovits, it will be well at the outset to have a clear understanding of each, and then consider the peculiarities of contracts of record generally, but yet mainly with reference to judgments as being the only contracts of record that ordinarily or usually occur.

Contracts of record are only technically the most important.

A judgment is defined to be the sentence of the law pronounced by the Court upon the matter appearing from the previous proceedings in the suit (*g*). It is obtained by issuing out a writ of summons, on which the defendant either makes default, whereby judgment is awarded in consequence of such default, or the case is tried and on a verdict judgment awarded in accordance with it (*h*).

Definition of a judgment.

A recognizance is an acknowledgment upon record of a former debt, and he who so acknowledges such debt

Definition of a recognizance.

(*g*) Brown's Law Dict. 198.

(*h*) See Indermaur's Manual of Practice, Part. II., chaps. 2, 5.

to be due is termed the recognizor, and he to whom or for whose benefit he makes such acknowledgment is termed the recognizee. It is very similar to a bond, but whereas a bond creates a new debt, a recognizance is merely an acknowledgment upon record of an antecedent debt (i).

Definition of
a cognovit.

Essentials as
to execution.

A cognovit is an instrument signed by a defendant in an action actually commenced, confessing the plaintiff's demand to be just, and empowering the plaintiff to sign judgment against him in default of his paying the plaintiff the sum due to him within the time mentioned in the cognovit (k). By 1 & 2 Vict. c. 110, it was provided for the protection of ignorant persons, who might be persuaded into executing a cognovit, that it must be attested by an attorney (l), and this protection has been still further extended by 32 & 33 Vict. c. 62 (m) which provides that "after the commencement of this Act (n) a warrant of attorney to confess judgment in any personal action, or cognovit actionem, given by any person shall not be of any force unless there is present some attorney of one of the superior courts on behalf of such person expressly named by him, and attending at his request, to inform him of the nature and effect of such warrant or cognovit before the same is executed, which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney;" and also (o) that "if not so executed it shall not be rendered valid by proof that the person executing the same did, in fact, understand the nature and effect thereof, or was fully informed of the same." In this enactment

(i) Brown's Law Dict. 303.

(k) Ibid. 67.

(l) All attorneys are now styled solicitors; Jud. Act, 1873, sect. 87.

(m) Sect. 24.

(n) 1st January, 1870.

(o) Sect. 25.

it will be noticed that a warrant of attorney is mentioned, being placed under the same provisions as to execution as is a cognovit, and as the two are sometimes confused by students it may be well to point out that there is this difference between them, viz. that a cognovit is a written confession of some existing action, whilst a warrant of attorney is simply a power given to an attorney or attorneys to appear in some action commenced, or to be commenced, and allow judgment to be entered up. Cognovits and warrants of attorney require to be filed in the Queen's Bench Division of the High Court of Justice within twenty-one days after execution (*p*); and there is a like provision as to judges' orders made by the consent of any defendant in a personal action, whereby the plaintiff is authorized forthwith, or at any future time, to sign or enter up judgment, or to issue or to take out execution (*q*).

Differences between a warrant of attorney and a cognovit

Now as to the peculiarities of contracts of record generally, but mainly with reference to judgments.

Of the peculiarities of contracts of record, particularly judgments.
1. Merger.

1. *Being of the highest nature of all contracts, they have the effect of merging either a simple contract or a contract entered into by deed (a specialty).*—It is a principle, not only with regard to contracts but also estates, that a larger interest swallows up or extinguishes a lesser one. If a person has an estate for years, and afterwards acquires an estate in fee simple, the former estate for years is lost in the greater estate in fee (*r*), and so here, if there is an ordinary contract by parol in writing or by deed, and judgment is recovered on it, the judgment merges the rights on the former contract, and the person's rights henceforth are on the new and higher contract, the judgment.

(*p*) 32 & 33 Vict. c. 62, s. 26.

(*q*) Ibid. s. 27.

(*r*) The Jud. Act, 1873, (s. 25 (4)), however, provides that there shall not now be any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity.

2. Estoppel.

2. *They have the effect of estopping the parties to them.*
 —Estoppel has been defined as a term of law whereby a person is stopped or hindered from denying a matter already stated (s), and it is because of the high nature of contracts of record that whilst they remain in existence they are conclusive, for no one can aver against a record, and this has been stated by Lord Coke, as follows: "The Rolls being the records or memorials of the judges of the court of record, import in them such uncontrollable credit and verity as they admit of no averment, plea, or proof to the contrary" (t). This is well illustrated by a somewhat recent case, in which the plaintiff was formerly clerk of the peace, and having been dismissed, brought an action against the defendant, his successor in office, to try his right to certain fees. It appeared that the justices had at quarter sessions found that the plaintiff had been guilty of contumaciously refusing to record an order that had been made by them as he should have done, and therefore they had dismissed him from his office, which they were justified on such a fact in doing. The Court here decided that the plaintiff was estopped in this action from denying the validity of the order so made at quarter sessions (u).

*Duchess of
Kingston's
Case.*

The leading authority generally referred to on the point of estoppel by matter of record is the *Duchess of Kingston's Case* (x), which goes to shew that a judgment is only a conclusive estoppel where the same matter is directly involved in it, and not where it is only incidentally involved, and also that, even although it might be otherwise a conclusive estoppel, yet that it may always be avoided by shewing fraud or collusion.

(s) Brown's Law Dict. 144. See also *post*, p. 14.

(t) 1 Inst. 260.

(u) *Wildes v. Russell*, L. R. 1 C. P. 722.

(x) 2 S. L. C. 784; Bul. N. P. 244.

3. *They require no consideration.*—This peculiarity results from the preceding one of estoppel; the want of consideration can be no defence or objection to proceedings on a judgment or other record, which, as we have seen, the party is estopped from denying. 3. As to consideration.

4. *A registered judgment has priority in payment.*—In the administration of an insolvent estate in equity, a judgment creditor stands first in the order of creditors, provided his judgment is duly registered under 1 & 2 Vict. c. 110 (presently noticed under the fifth peculiarity of these contracts), which is an important advantage if the estate is insufficient to pay every one (*y*). And though the Judicature Act, 1875 (*z*), provides that the same rules shall prevail as to the respective rights of secured and unsecured creditors as are in force in bankruptcy, this does not in any way affect this rule (*a*). 4. As to priority of payment.

5. *A judgment constituted a charge on the lands of the judgment debtor (b).*—This is a peculiarity of the past, and the following is a short summary of the past and present laws upon the subject (*c*):— 5. As to charging lands.

By 13 Ed. 1, c. 18, half a judgment debtor's lands could be taken in execution under a writ of *elegit*.

By 29 Car. 2, c. 8, sect. 10, execution could also be issued to the above extent on judgments entered up

(*y*) And now this advantage does not only apply to English judgments, but also to Irish judgments and Scotch decreets, if registered here, it being by 31 & 32 Vict. c. 54, s. 1, provided that, if registered here, they shall have the same force and effect as if original judgments of this country.

(*z*) 38 & 39 Vict. c. 77, s. 10 (instead of sect. 25, sub-sect. 1 of the Judicature Act, 1873).

(*a*) See hereon, Snell's Principles of Eq. 263.

(*b*) This was recently extended to Irish judgments and Scotch decreets if registered under 31 & 32 Vict. c. 54. See note (*y*).

(*c*) The law of judgments as affecting lands belongs more properly to the subject of conveyancing and real property, and, for fuller information than is contained in the few remarks above, the student is referred to the dissertations in Prideaux's Conveyancing.

against a *cestui que trust* of freeholds, provided they were vested in a trustee in fee simple, and he was duly seised of them.

By 1 & 2 Vict. c. 110, a judgment was made a charge upon the whole lands of a judgment debtor, of whatever nature, but judgment was not to affect purchasers until registered in the name of the debtor.

By 2 & 3 Vict. c. 11, all judgments, to so bind, must be re-registered every five years.

By 23 & 24 Vict. c. 38, no judgment to be entered up after the passing of that Act (July 23, 1860), was to affect any lands, unless a writ of execution was issued and registered and put in force within three calendar months from the time of registration.

And now, by the 27 & 28 Vict. c. 112 (the statute in force upon the subject at the present day), it is provided that no judgment to be entered up after the passing thereof (July 29, 1864), shall affect any lands until the same shall have been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority.

6. As to proof. 6. *They prove themselves*—which means that when necessary to prove a contract of record the mere production thereof is sufficient proof, and this is always their proper mode of proof; so that when there is an issue of *nul tiel record* (no such record), either the record itself must be produced, or it may be proved by exemplification under the great seal, or by an examined or sworn copy (*d*).

The two remaining kinds of contracts under this division are specialties and simple contracts, and these

are of ordinary practical and constant occurrence, and therefore of very much more importance to the student than contracts of record. A specialty—or contract under seal—is termed a deed because of the peculiar solemnities attending its execution, it being not only signed (*e*), but also sealed and delivered, whilst a simple contract is either by parol, or at most in writing not under seal, and it is from the point of the supposed additional solemnities attending the execution of deeds or specialties, that we may trace the numerous distinctions which exist between them on the one hand, and simple contracts on the other. These distinctions are mainly as follows:—

Distinctions
between
specialties
and simple
contracts.

1. *As to the execution.*—Here, as just stated, the essential formalities to be observed on the execution of a deed are sealing and delivery, whilst a simple contract may be even by word of mouth, and if writing is used, signature only is necessary. One of the essentials, too, of the deed being delivery, a person may execute a deed as an escrow, *i.e.*, “so that it shall take effect or be his deed on certain conditions” (*f*), by delivering it to some *third* person, and then it will not take effect until the happening of the condition, though on the condition being performed it will relate back to the original date of execution. A deed cannot be delivered as an escrow to the other party to it, it must be to some third person, but it may be delivered to a solicitor acting for all parties (*g*).

1. As to
execution.

Escrow.

2. *As to merger.*—The principle of merger has already been explained (*h*), and it may be defined as an operation of law whereby a security or estate is swallowed up or lost in a greater (*i*). It has already been

2. As to
merger.

(*e*) There is some doubt whether signing is actually necessary to the validity of a deed.

(*f*) Chitty on Contracts, 4. See also Brown's Law Dict. 141.

(*g*) *Millership v. Brooks*, 5 H. & N. 797.

(*h*) *Ante*, p. 9.

(*i*) See also Brown's Law Dict. 233.

remarked that the effect of a record will be to merge any contract respecting the same matter not by record, because of its higher nature; and so here, a deed, though of a technically less important nature than the record, and liable to be merged in it, yet in its turn, being more important than a simple contract, it will cause a merger of that.

3. As to
estoppel.

Estoppel by
deed.

Collins v.
Blantern.

3. *As to estoppel.*—This doctrine has already been touched upon in its bearing on contracts of record (*k*); but in addition to the definition given there of it, it may be well to note here Lord Coke's definition, which is perhaps a better one when the term is applied to estoppel otherwise than by matter of record. His definition of it is, "where a man is concluded by his own act or acceptance to say the truth" (*l*). It has been noted that a record will estop the parties to it and those claiming under them, and so in a deed the doctrine of estoppel applies, though generally speaking it does not in a simple contract. Thus, if a man executes a deed, stating or admitting in that deed a certain fact, he is precluded from denying it, the reason being the solemnity of the deed; whilst in a simple contract the person entering into it may shew the contrary of what he has in it admitted. But in discussing the doctrine of estoppel, what was decided in the leading case of *Collins v. Blantern* (*m*) must be noticed, viz. that though a person is estopped from denying what he has stated in a deed, yet he may set up the illegality or fraud of the instrument. In that case the plaintiff sued on a bond executed by certain parties, of whom the defendant was one, the obligation of which was £700, conditioned for payment of £350. The defendant pleaded the following facts: Certain parties were prosecuted by one John Rudge, and pleaded not guilty, and, according to arrangement,

(*k*) *Ante*, p. 10.

(*l*) Co. Litt. 352 a.

(*m*) 1 S. L. C. 369; 2 Wilson, 341.

the plaintiff gave his promissory note to the prosecutor, John Rudge, he to forbear further prosecuting, and as part of the arrangement, the bond on which the plaintiff sued was executed to indemnify him. Now the facts shewed illegality in the whole matter, for it was the stifling of a criminal prosecution; but had the doctrine of estoppel applied here, the defendant would have been precluded from setting it up. It may be noticed on this point of estoppel, that if a person in the body of a deed admitted having received the consideration money, at law he was estopped from setting up that he had not received it; but in equity he might always have done so, otherwise the doctrine of the vendor's lien for unpaid purchase-money could not well have existed. Now, as the Judicature Act, 1873 (*n*), provides that where the rules of law and equity clash, the latter shall prevail, the consequence is that in such a case a person is now always able to do what he could, as above stated, have formerly done in equity. Estoppel, however, besides being by record or deed, may also in some cases be *in pais*, i.e., by the conduct of the parties; e.g., where an infant, having made a lease, accepts rent after he comes of age, he will be estopped from denying its validity (*o*).

4. *As to consideration.*—The consideration is the price or motive of a contract, and is either good or valuable. A valuable consideration may be defined as some benefit to the person making the promise, or a third person, by the act of the promisee, or some loss, trouble, inconvenience to, or charge imposed upon the person to whom the promise is made (*p*). It is an essential and unflinching rule that all simple contracts require a valuable consideration; if they have no consideration,

Estoppel in
pais.

4. As to
consideration.
Definition of a
valuable
consideration.

(*n*) Sect. 25 (11).

(*o*) See hereon as to effect of 37 & 38 Vict. c. 62, *post*, p. 175, note (*w*).

(*p*) This definition is gathered from what is stated as to the sufficiency of the consideration in Chitty on Contracts, p. 19.

or a merely good consideration, which is such as natural love and affection, they will not be binding, and no action will lie for their breach (*q*); whilst a deed will be perfectly valid and binding with a merely good consideration, or with no consideration at all (*r*). This distinction plainly arises from the fact of the additional solemnity and importance of a deed.

A voluntary deed is not in every respect as good as a deed founded on valuable consideration.

It must not, however, from this be taken by the student for granted that a voluntary deed is in every respect as good as a deed founded on valuable consideration. All that is meant is that as between the parties it is no objection to the validity of a deed, and no consequent answer to an action brought upon it, that there was no consideration for the benefits conferred or the obligations entered into by it, as it would be in the case of a simple contract. But even a deed entered into without consideration stands on weak ground, for there are three ways in which it may possibly be affected on account of its want of consideration.

13 Eliz. c. 5.

The statute 13 Eliz. c. 5, provides that all gifts and conveyances of either chattels or land, made for the purpose of defeating, hindering, or delaying creditors, are void against them unless made *bonâ fide* upon good (which means here valuable) consideration, and *bonâ fide* to some person without notice of the fraud. The mere fact of any conveyance or assignment being voluntary will not necessarily render it bad under this statute; but the fact of its voluntary nature will cause suspicion to attach to it, and every such voluntary instrument is therefore liable to be set aside under this statute.

(*q*) *Lampleigh v. Braithwaite*, 1 S. L. C. 151; Hobart, 105.

(*r*) An important exception to this rule arises in the case of contract in restraint of trade, which even though by deed must have a valuable consideration.

By 27 Eliz. c. 4, it is provided that all voluntary conveyances of land shall be void against subsequent purchasers for valuable consideration with or without notice; the effect of which is, that, although a person may make a perfectly good voluntary conveyance to another of his land, yet if he afterwards convey that land for value, even although the latter person knows of the prior voluntary conveyance, he will take in preference to it (s).

By the Bankruptcy Act, 1869 (t), any voluntary settlement made by a trader is void if he becomes a bankrupt within two years; and if he becomes bankrupt after that time, but within ten years, it is also void, unless the parties claiming under such settlement can prove that the settlor was at the time of making it able to pay all his debts without the aid of the property comprised in such settlement (u). Bankruptcy Act, 1869.

These three points, then, are manifest disadvantages under which a deed stands when created without consideration, although, as has been stated, no consideration is necessary to a deed to render it valid as between the parties.

5. *As to limitation*.—A simple contract is barred after six years (x); a deed after twenty years (y). 5. As to limitation.

6. *As to their extent*.—A deed, if the heirs were bound, and the heir had assets by descent, bound him, whilst a simple contract did not; so that this distinction between a specialty and a simple contract was formerly one of great importance, for a simple contract creditor had no right to come upon the real estate 6. As to extent.

(s) See further hereon Snell's Principles of Equity, 66.

(t) 32 & 33 Vict. c. 71, s. 91.

(u) See hereon Ringwood's Principles of Bankruptcy 47.

(x) 21 Jac. 1, c. 16.

(y) 3 & 4 Wm. 4, c. 42. See as to limitation generally, *post*, pp. 209–216. It may be mentioned that a provision is under contemplation, having for its object a further alteration in the period of limitation. By it, it is proposed that a simple contract shall be barred after three years, and a deed after twelve years.

3 & 4 Wm. 4, descended to the heir for part of his debt. By 3 & 4
 . c. 104 Will. 4, c. 104, this anomaly was done away with, that
 statute providing that real estate should be liable for
 payment of simple contract as well as specialty debts,
 provided, however, that creditors by specialty in which
 the heirs were bound should be paid first. This dis-
 32 & 33 Vict. tinction has also now been done away with by 32 & 33
 c. 46. Vict. c. 46, which provides that all creditors, as well
 by specialty as simple contracts, shall be treated as
 standing in equal degree.

7. As to dis-
 charge.

7. *As to their discharge.*—Though a simple contract
 may be discharged in various ways (as, for instance, by
 accord and satisfaction (*z*)), a deed, speaking generally,
 can at law only be discharged by an act of as high or of
 a higher nature (*a*). But in equity a deed might some-
 times have been put an end to by a parol agreement,
 and it must be remembered that the rules of equity in
 all cases now prevail (*b*). This last distinction, there-
 fore, with the previous one, may be put down as of
 little practical importance, however valuable they both
 may be considered by the student as points of history
 in the law.

Express and
 implied con-
 tracts.

With regard to the division of contracts into those
 expressed and those implied it is not necessary to say
 much, as the very names, indeed, point out what is
 meant; but it may be useful to enumerate a few cases
 in which a contract will be implied, as instances. If
 in any trade or business there is some well-known
 and established usage or custom, and two persons enter
 into any contract which does not exclude such usage
 or custom, and contains nothing antagonistic to it,
 the usage or custom will be implied to be part of
 their contract: so if between two persons there has
 been a practice in past years for interest to be paid on

(*z*) As to which, see *post*, 207–209.
 (*a*) See Broom's Coms., 299–304.
 (*b*) Jud. Act. 1873, sect. 25 (11).

balances between them, a contract will continue to be implied to that effect until something is said or done to the contrary (c). Again, if a landlord gives his tenant notice to quit or else pay an advanced rent, and the tenant says nothing, but continues to hold on, his contract to pay such advanced rent will be implied; and if any deed or other instrument contains a recital or any words shewing a clear intention to do some act, a contract to do it is implied (d).

An express contract is more certain and definite than an implied contract, which indeed can only exist in the absence of an express contract, the maxim being *Expressum facit cessare tacitum*.

Again, on the third division of contracts into those executed and those executory, it is necessary to say but little, the words almost explaining what is meant. An executed contract is one in which the act has been done, as if a contract is made for the sale and purchase of goods, and the price paid and the goods handed over; an executory contract is one in which the act contracted for is to be done at some future time, as if a person agrees to supply another with certain goods on the arrival of a ship in which they are. Contracts may also be entirely executed or entirely executory, or in part executed and in part executory (e).

On an executory contract one important point may be usefully noted. In such a contract, of course, it must be apparent that, generally speaking, no action can be brought for its breach until the day arrives for its performance; but it has been decided that where a person before the day declares that he will not perform

(c) See Chitty on Contracts, 57-59.

(d) See *Knight v. Gravesend, &c.*, 2 H. & N. 6.

(e) As to distinctions between contracts executed and executory, see Benjamin's Sale of Personal Property, 227.

his contract, or renders himself incapable of performing it, the action may be brought immediately without waiting for the future day (*f*).

Consequences
flowing from
the breach of a
contract.

Where a valid contract has been entered into between the parties, and there is a breach of it, certain consequences flow from that breach. Looking at judgments as contracts of record, if a judgment is not complied with by the party against whom it is given, there are various means pointed out by law for obtaining satisfaction of it, the chief being by execution (*g*). In the case of a breach of a specialty or a simple contract, an action has to be brought against the person committing the breach, and damages are awarded in such action for the breach, such damages being estimated by a jury in accordance, as far as can be, with the settled principles of what is the measure of damage, a subject which will be discussed latter on in the present work (*h*). In some cases, also, relief may be obtained beyond mere damages, *e.g.* in an action for breach of a contract to deliver specific goods, a plaintiff may, under the provisions of the Mercantile Law Amendment Act, 1856 (*i*), obtain an order for the delivery to him of the specific goods themselves (*k*).

In some cases, also, the breach of a contract by one of the parties may cause him to forfeit his right to any compensation for what he has done before breach. Thus, if a servant hired by the month leaves in the middle of a month, he will lose the whole month's wages (*l*).

Rules for the
construction of
contracts.

The last subject to be considered in the present chapter is that of the rules for construction of contracts,

(*f*) *Hochster v. De la Tour*, 2 Ell. & Bl. 678; *Frost v. Knight*, L. R. 7 Ex. 111. See also *post*, ch. viii. p. 198.

(*g*) As to the different modes of enforcing a judgment, see Indermaur's *Manual of Practice*, 81.

(*h*) As to the Measure of Damages, see *post*, Part iii. ch. i.

(*i*) 19 & 20 Vict. c. 97, s. 2.

(*k*) See *post*, Part ii. ch. i. pp. 360, 361.

(*l*) See hereon also *post*, ch. vi. pp. 170.

a matter of considerable importance. In the first place, it must be observed, that while the jury decide on questions of fact, it is for the Court to put the correct construction on any instrument; and, to ensure uniformity in construction as far as possible, certain rules have been framed and handed down from time to time. These rules are stated by Mr. Chitty in his work upon Contracts very fully (*m*), and the most important of them are as follows:—

1. *Every agreement shall have a reasonable construction according to the intention of the parties : e.g., if a person borrows a horse it will be considered a part of the agreement that he shall feed it during the time it remains in his possession. This is a great and important rule of construction, but upon it two points must be borne in mind : “ first, that it is not enough for a party to make out a possible intention favourable to his view, but he must shew a reasonable certainty that the intention was such as he suggests ; and, secondly that all latitude of construction must submit to this restriction, viz., that the words and language of the instrument will bear the sense sought to be put upon them ; for the Court cannot put words in a deed which are not there, or put a construction on the words of a deed directly contrary to the plain sense of them ”* (*n*)

1. Agreements to be construed reasonably.

2. *Agreements shall be construed liberally ; e.g., the word men used in a contract may often be held to include both men and women* (*o*).

2. Agreements to be construed liberally.

3. *Agreements shall be construed favourably ; which means that such a construction shall be put that, if possible, they may be supported : thus, if on an instru-*

3. Agreements to be construed favourably.

(*m*) See Chitty on Contracts, 70–96, from which pages the following remarks on the construction of contracts are mainly gathered.

(*n*) Chitty on Contracts, 72.

(*o*) See, as to the liberal construction of certain words in statutes 13 & 14 Vict. c. 21, s. 4.

ment it is possible to put two constructions, one of which is contrary to law and the other not, the latter shall be adopted; and it is upon this principle that words sometimes have different meanings given to them: thus, the word "from" is *primâ facie* exclusive, but it always depend on the context; and the words "on" or "upon" may mean either before the act to which it relates, or simultaneously with the act done, or after the act done; and the word "to" may mean "towards" (p).

4. Words are to be understood in their ordinary meaning.

4. *Words are to be understood in their plain, ordinary, and popular sense*; but if words have by any usage of trade or custom obtained a particular signification, then that meaning will generally be put upon them.

5. The construction shall be on the entire instrument.

5. *The construction shall be put upon the entire instrument, so that one part may assist another*; and it is upon this rule that, to further the evident intention of the parties, words used in a contract may be transposed, and again, that where there are general words following after certain particular words, they will be construed as only *ejusdem generis* with the particular words. This rule also has to be taken subject to the maxim *Falsa demonstratio non nocet*, the meaning of which maxim has been well stated to be, "that if there is in the former part of an instrument an adequate and sufficient description shewing with convenient certainty the subject-matter to which it was intended to apply, a subsequent erroneous addition will not vitiate that description" (q).

Falsa demonstratio non nocet.

6. The *lex loci contractus* is to prevail unless the parties made their contract with reference to another country.

6. *A contract is to be construed according to the law of the country where made, except when the parties at the time of making the contract had a view to a different country.*—From this it follows that if a contract is

(p) Chitty on Contracts, 78.

(q) Ibid. 85.

made anywhere out of England, and an action is brought on it here, it will be material to give evidence to shew what the law of the place where it was made is as to it (r); and with regard to the last part of this rule, what is meant is, that although the *lex loci contractus* generally applies, yet if the parties have at the time in contemplation the performance of the contract in another country, then the law of that country will apply, *e.g.*, if a bill of exchange is executed here but made payable abroad.

And notwithstanding the rule that the *lex loci contractus* is to govern, yet, although a contract is made abroad, as regards the proceedings to enforce it, the *lex loci fori* (that is, the law of the country where the action is brought), governs; so that, for instance, although a contract is made abroad in a country where the period of limitation for bringing the action is different to what it is here, yet, if the action is brought here our Statute of Limitations will bind.

But in bringing an action the *lex loci fori* governs.

7. *If there are two repugnant clauses in a contract, the first is the one to be received (s).*

7. Of two repugnant claims the first is to be received.

8. *The construction shall be taken most strongly against the grantor or contractor; but this is a rule not to be resorted to until after the other rules of construction fail, and in some cases it will not apply at all.*

8. The construction is to be taken against the grantor.

9. *Parol evidence is never admissible to vary or contradict a written contract, but it is admissible to explain in the case of a latent, though not in the case of a patent ambiguity.*—A patent ambiguity is one appearing on the face of the instrument; a latent ambiguity is one not so appearing, but raised by extraneous evidence;

9. Parol evidence not admissible to contradict a written contract.

(r) Per Lord Eldon in *Smale v. Roberts*, 3 Esp. 163, 164.

(s) It may be noted that the contrary is the rule in the case of a will, for as a subsequent will revokes a former, so a later clause will have effect over an earlier.

and the distinction between these two cases as to the admissibility of parol evidence has been so well stated by Lord Chief Justice Tindal, that the author cannot refrain from here giving his remarks, although somewhat lengthy. His lordship stated as follows:—

The distinction as to the admissibility of parol evidence in the case of a patent and a latent ambiguity, as stated by Lord Chief Justice Tindal.

“The general rule I take to be that, where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument or the subject matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that, in such case, evidence *dehors* the instrument for the purpose of explaining it according to the surmised or alleged intention of the parties, is utterly inadmissible. The true interpretation, however, of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered an exception, or, perhaps, to speak more precisely, not so much an exception from, as a corollary to, the general rule above stated, that where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself; for both reason and common sense agree, that by no other means can the language of the instrument be made to speak the real mind of the party. Such investigation does of necessity take place in the interpretation of instruments written in a foreign language; in the case of ancient instruments; in cases where terms of art or science occur; in mercantile contracts, which in many instances are in a peculiar language employed by those who are conversant in trade and commerce; and in other instances in which the words,

besides their general common meaning, have acquired, by custom or otherwise, a well-known peculiar, idiomatic meaning, in the peculiar county in which the party using them was dwelling, or in the particular society of which he formed a member, and in which he passed his life " (t).

When a contract has once been reduced into writing, evidence cannot be given to shew that the parties at the time agreed by parol that some other term or stipulation should be part and parcel of the contract, for to admit any such evidence would be in effect to vary the written instrument (u). Of course if the contract is not one which is required to be in writing, there is nothing to prevent the parties subsequently making some fresh stipulation, for that will simply be making to that extent a fresh agreement. *Goss v. Lord Nugent.*

In addition to the foregoing rules, it may be well to mention a few other points on the construction of contracts. In mentioning the subject of implied contracts, we have already stated that where there is some well-known and established usage or custom in a trade, persons may be taken in their contracts to have had that in view at the time, and a contract may be construed on that footing, provided, of course, that the custom or usage does not clash with the contract; for it is an imperative principle of construction that whenever there is an implied contract, and the parties have also expressly agreed on the point, the maxim *Expressum facit cessare tacitum* will have effect (x).

When a contract is to be completed by a certain day, the rule at law formerly was that time was of the essence of the contract; but in equity it was never so, *As to when time is of the essence of a contract.*

(t) *Shore v. Wilson*, 9 C. & F. 355, 365.

(u) *Goss v. Lord Nugent*, 5 B. & A. 58.

(x) *Ante*, p. 19, and see hereon *Wigglesworth v. Dallison*, 1 S. L. C. 594; Dougl. 201.

unless expressly so stipulated, either at the time of the contract or by notice given afterwards, or it appeared to be so intended from the nature of the property, *e.g.* :— where a reversion was being sold, as it might at any moment, through the falling in of the life estate, become an estate in possession. The rule of equity on this point now prevails in all branches of the High Court of Justice (y).

Meaning of
the term
“ month.”

The term “ month ” in a contract signifies a lunar month, except in the case of mercantile contracts, *e.g.*, bills of exchange, when it signifies a calendar month. In a statute passed before 1851, it means, *primâ facie*, a lunar month, but after that time a calendar month (z).

(y) Jud. Act, 1873, s. 25 (7).

(z) 13 & 14 Vict. c. 21, s. 4.

CHAPTER II.

OF SIMPLE CONTRACTS, AND PARTICULARLY OF CASES IN WHICH WRITING IS REQUIRED FOR THEIR VALIDITY.

A SIMPLE contract may be defined as an agreement relating to some matter, and either made by word of mouth or writing not under seal ; and they have been said to be called simple because they subsist by reason simply of the agreement of the parties, or because their subject-matter is usually of a more simple or of a less complex nature (a). Simple contracts have four great essentials, which are—(1) Parties able to contract ; (2) Such parties' mutual assent to the contract ; (3) A valuable consideration ; and (4) Something to be done or omitted which forms the object of the contract (b). There are in certain cases other requirements, and particularly, in some cases, writing is necessary, which will presently be inquired into.

Definition of a simple contract.

Four essentials to simple contracts.

Firstly, then, as to the parties to contracts. As a general rule, all persons are competent to contract, for the law presumes this until the contrary is shewn ; but this is liable to be shewn in numerous cases, and it will be found that in some cases the incompetency to contract is absolute, in others only limited ; in some the contract is of no effect at all, in others only so with regard to the incompetent party (c)

Generally speaking all persons are competent to contract.

The chief cases of incompetency to contract, either entire or limited, may be stated to be in the case of

Cases of incompetency to contract.

(a) Brown's Law Dict. 333.
 (b) Chitty on Contracts, 8.
 (c) Ibid. 15.

infants, married women, persons of unsound mind, intoxicated persons, persons under duress, and aliens; and as contracts with all these persons are discussed in a subsequent chapter, nothing further need here be remarked as to them (*d*).

There must be mutual assent of the parties.

Secondly, as to the mutual assent, it is essential that both the parties should agree to exactly the same thing; there must be mutuality in the contract, or there can be no contract at all (*e*); thus if there is a direct offer on the one side, and a direct and unequivocal acceptance on the other, to exactly the same thing, then there is a perfect contract; but if the acceptance is in any way conditional, or introduces any fresh term or stipulation, then there is no complete contract, unless that fresh stipulation is in its turn directly acceded to by the other contracting party.

Jordan v. Norton.

Thus, in the case just referred to below, of *Jordan v. Norton*, the defendant had offered to purchase a horse of the plaintiff, provided he warranted the animal "sound and quiet in harness," and the plaintiff wrote in reply, warranting that it was "sound and quiet in double harness." It was held that there was here no complete contract, the plaintiff's warranty not being in the same terms as was stipulated for by the defendant in his offer.

What is necessary to establish a contract from different instruments.

This rule as to mutuality occurs most frequently, not in cases of parol offer and acceptance, but where the contract is made out from different instruments. To establish a contract in such a way it is always necessary to shew that there is an offer, and a direct acceptance of that offer. There is also another point necessary here, and that is that the different instruments offered as constituting an entire contract must be connected *inter se*, that is, by reference in themselves to each other, without the necessity of any

(*d*) See *post*, chap. vii.

(*e*) *Jordan v. Norton*, 4 M. & W 155.

parol evidence to connect them. This is well shewn by the case of *Boydell v. Drummond* (f), which was an action for alleged breach of a contract to take and pay for a set of prints from some of the scenes in Shakespeare's plays, and which contract as it was not to be performed within a year was required to be in writing, under the 4th section of the Statute of Frauds. The agreement in writing on which it was sought to charge the defendant was this, that printed copies of the prospectuses containing the full particulars of the publication lay on the counter of the plaintiff's shop for inspection, and that there was also a book lying there, headed "Shakespeare subscribers, their signatures," and that the defendant had signed his name in this book; but it also appeared that there was nothing in the book containing the signatures, referring to the prospectus, nor was there anything in them referring to the book, and upon this it was held that there was no binding contract, the reason being shewn in the following passage from one of the judgments delivered: "If there had been anything in the book which had referred to the particular prospectus, that would have been sufficient; if the title to the book had been the same as the prospectus, it might perhaps have done; but as the signature now stands, without reference of any sort to the prospectus, there was nothing to prevent the plaintiff from substituting any prospectus, and saying that it was the prospectus exhibited in his shop at the time to which the signature related" (g).

Any offer that is made by a person does not bind him until it is accepted by the person to whom it is made, for until then he has a *locus poenitentiae* allowed him (h); and this is true, although the person making the offer expressly gives the person to whom it is made a certain

An offer made is not binding till accepted.

(f) 11 East, 142.

(g) *Per Le Blanc, J.*, 11 East, 158.

(h) *Routledge v. Grant*, 4 Bing. 653.

time to accept or reject it. There is nothing binding between the parties until accepted; but then, when the unconditional acceptance is once made, there is a perfect and binding contract. When an offer is made by letter, which is to be accepted by a particular time, there is a presumption that the intention to contract continues until that time arrives, unless the offer is before then rescinded; so that where in one case an offer was made by the defendant to sell at a certain price, "receiving an answer by return of post," and through the defendant's mistake the plaintiff did not get the letter at the time he should have done, but when he did receive it sent an answer by return of post, and the defendant had in the meantime considered the bargain off, and sold to some one else, it was held that there was a perfect contract (i); and also, in another case, an offer was made which required an answer by return of post, and, by the fault of the post-office officials, the letter did not reach the plaintiff when it ought to have done, but directly he did receive it, he accepted the offer, it was held that there was a complete contract (k).

When a contract taking place through the post is complete.

It has now been definitely decided with regard to contracts taking place through the post, that such a contract is complete directly the letter accepting the offer is posted, even although it may never reach its destination (l). It had formerly been held that such a contract is not complete until the letter of acceptance is received by the party making the offer (m), but this decision is now clearly overruled, and the law is as just stated.

Recovery of reward offered by advertisement.

It has been held that where a person offers by advertisement a reward for the doing of some act, any person doing such act has a right to recover the advertised

(i) *Adams v. Lindsell*, 1 B. & Ald. 681.

(k) *Dunlop v. Higgins*, 1 H. L. Cas. 381.

(l) *Harris' Case*, L. R. 7 Ch. Ap. 587; *The Household Fire and Carriage Accident Insurance Co. (Limited) v. Grant*, L. R. 4 Ex. Div. (C. A.) 216.

(m) *British American Telegraph Co. v. Colson*, L. R. 6 Ex. 108.

reward. This is at first only an offer to the whole world at large, but any particular person doing the act renders it the same as if the offer were made to and accepted by him, and the doing of the act required amounts to a valuable consideration, so that all the essentials of a valid simple contract exist (n).

Thirdly, as to consideration. A valuable consideration has already been defined (o), and upon it the first point to be noticed is that, though some valuable consideration is an essential to a simple contract, yet the question of whether or not the consideration is sufficient for what is agreed to be done will not be entered into; thus cases have clearly decided that the forbearance of legal proceedings for a very short time is a perfectly valid consideration for an agreement to pay a much larger sum (p); but if, of course, the professed consideration is practically nothing at all, but simply a nullity, as, for instance, the surrender of a tenancy at will, which may be determined at any time, then it will not be sufficient. It was also the rule in equity in cases of most utter and unconscionable inadequacy of consideration—such inadequacy in fact as to shock the conscience—to give relief on the ground of some imposition or fraud, and in the case of bargains with expectant heirs, it is generally necessary to shew that a full consideration was paid (q); but this, though undoubtedly now applying to all branches of the High Court of Justice, does not, nevertheless, do away with the correctness of the general rule that the question of adequacy or inadequacy of the consideration will not be entertained.

The question of whether or not a consideration is sufficient for what is agreed to be done cannot be considered.

When writing is used, it has been decided that it is not sufficient for the writing to shew the promise and

Where writing is used it must shew the consideration as well as the promise.

(n) *Per* Lord Campbell, in *Gerhard v. Bates*, 2 E. & B. 476, quoted in Broom's Coms. 324.

(o) See *ante*, p. 15.

(p) See, for instance, *Smith v. Algar*, 1 B. & A. 603.

(q) See hereon Snell's Principles of Equity, 476.

*Wain v
Warlters.*

Exceptions to
the rule.

then to shew by parol that there was a consideration for that promise, but both the promise and the consideration must appear on the face of the written contract, or it will not be good; for the consideration is part of the agreement (*r*), and this is so, even though writing was not necessary to the validity of the instrument; for if the parties have chosen to have writing, then that writing must contain the whole agreement.

To this rule there are exceptions in the case of bills of exchange and promissory notes, in which, by the custom of merchants, the consideration is presumed until the contrary is shewn, and also in the case of guarantees, as to which it is provided by the Mercantile Law Amendment Act 1856 (*s*) as follows: "No special promise to be made by any person after the passing of this Act, to answer for the debt, default, or miscarriage of another person, being in writing, and signed by the person to be charged therewith, or some other person thereunto lawfully authorized, shall be deemed invalid to support any action, suit, or other proceeding, to charge the person by whom such promise shall have been made by reason only that the consideration for such promise does not appear in writing or by necessary inference from a written document." The reason of this alteration in the case of guarantees was because it was found in practice that the rule led to many unjust and technical defences to actions upon guarantees (*t*); but the student will of course observe here that the statute does not dispense with the necessity of a consideration to a guarantee, but merely provides that it need not appear on the face of the instrument.

Considerations
divided with
reference to
the time of
their
performance.

Considerations with reference to the time of their performance may be either *executed*, i.e., something done before the making of the promise; *executory*, i.e.,

(*r*) *Wain v. Warlters*, 2 S. L. C. 251; 5 East, 10.

(*s*) 19 & 20 Vict. c. 97, s. 3.

(*t*) 2 S. L. C. 263.

something to be done at a future day; *concurrent*, i.e. taking place simultaneously; or *continuing*, i.e., partly performed, and partly yet to take place (u) A very important question to be asked on this subject is, will an executed consideration support a promise? and the answer is mainly found in the leading case of *Lampleigh v. Braithwaite* (x), which decides that "a mere voluntary courtesy will not uphold assumpsit, but a courtesy moved by a previous request will." An executed consideration, therefore, to support a promise, must be moved by a precedent request, e.g., if the plaintiff in his statement of claim alleges that in consideration that he had done a certain act for the defendant the defendant promised, this would be bad (y); but if he stated that in consideration that he had done a certain act for the defendant *at his request* the defendant promised, this would be good. This previous request may be either express or implied, for it will be implied in some few cases, of which the following are the chief:—

An executed consideration will only support a promise when moved by a precedent request, express or implied.

Lampleigh v. Braithwaite.

1. Where the plaintiff has been compelled to do that which the defendant was legally compellable and ought to have done, e.g., where the plaintiff was a surety for the defendant and has been called upon to pay and has paid the amount for which he was surety.

Cases in which the previous request will be implied.

2. Where the plaintiff has voluntarily done such an act, and in consideration thereof the defendant has afterwards expressly promised to reimburse him. A person cannot recover for his spontaneous act without such subsequent promise (z), but the promise being made, then the prior request is implied. And even although the debt which the plaintiff has paid was one which could not itself have been enforced at law, e.g., a wager

(u) Chitty on Contracts, 48-52.

(x) 1 S. L. C. 151; Hobart, 105.

(y) See *Roscorla v. Thomas*, 3 Q. B. 234.

(z) *Stokes v. Lewis*, 1 T. R. 20.

or gaming debt, yet a promise being made the money paid is recoverable (a).

3. Where the defendant has accepted the benefit of the consideration, *e.g.*, if a tradesman sends to a man goods the latter never ordered, but he chooses to keep them (b); and

4. Where the plaintiff has voluntarily done some act for the defendant which is for the public good, *e.g.*, in paying the expenses of burying a person in the absence of the one legally liable to pay such expenses (c).

There are two cases in which though there is actually an express previous request no action can be maintained, viz., in the case of barristers and physicians, for any fee is here looked upon as an honorarium (d).

An executed consideration from which the law implies a promise will not support any other promise.

Roscorla v. Thomas.

In discussing executed considerations, there is another important point to be mentioned, and that is, that where from the executed consideration the law implies a promise, the force and strength of the consideration is exhausted in producing an implied promise, and it will support no express promise in addition to it. Thus it was held that where an account had been stated and a sum found to be due thereon to the plaintiff, that this fact would not support an express promise to pay such sum *in futuro*, because the promise that the law implied from it was to pay *in præsenti* (e). So, again, in the case of *Roscorla v. Thomas* (f), where, in consideration that the plaintiff *had* bought a horse of the defendant, the defendant promised that the horse was free from vice, it was held that there was no consideration to support this promise, for it was an executed

(a) Roscoe's Digest, 510; *Knight v. Chambers*, 24 L. J. (C.P.) 121; *Roseware v. Billing*, 33 L. J. (C.P.) 55.

(b) 1 S. L. C. 158; Chitty on Contracts, 49.

(c) Roscoe's Digest, 513.

(d) See more fully hereon, *post*, chap. vi. pp. 162, 165.

(e) *Hopkins v. Lojan*, 5 M. & W. 247.

(f) 3 Q. B. 234.

consideration from which the law had already implied a promise to pay, and therefore it would not serve to support any other promise.

There are many matters of a past nature which throw upon a person a moral obligation, but though there have been cases to shew that a merely moral consideration will support a promise (g), they may be put aside as undoubtedly not law at the present time, and it can be definitely stated that a consideration only moral will not be sufficient to support a contract. This is well illustrated by the case of *Beaumont v. Reeve* (h), in which it was decided that a promise by a man that, in consideration that he had seduced and cohabited with a woman, he would make her a certain payment, was merely *nudum pactum*, and could not be enforced—the seduction gave forth no obligation which, according to our laws, could be enforced, and therefore no promise could give a right of action on it. The student must not confuse this with a promise by a man to pay a sum to the mother of his illegitimate child towards its support, for this would be perfectly valid, as a mother by undertaking the entire support of such child does more than by law she is bound to, and this forms a sufficient consideration for the promise.

A merely moral consideration will not support a promise.

Beaumont v. Reeve.

But though a merely moral obligation will not constitute a sufficient foundation to support a promise, yet if it is not entirely of a moral nature, but was once a legal obligation, which has only become a moral one by reason of having become devoid of legal remedy, it may support a promise (i). The correct rule upon the point has been well stated to be that “an express promise can only revive a precedent good consideration which might have been enforced at law through the medium of an implied promise, had it not been sus-

But a moral obligation which was once a legal one will support a promise.

(g) See them cited in Chitty on Contracts, 36.

(h) 8 Q. B. 433.

(i) 1 S. L. C. 159.

pended by some positive rule of law; but *can give no original right of action if the obligation on which it is founded could never have been enforced at law*, though not barred by any legal maxim or statute provision" (*j*). Thus in the case of an agreement to pay a sum in consideration of past seduction, this is an obligation which never could have been enforced at law, but in the case of a debt which has been barred by the Statute of Limitations, though, being so barred, the obligation to pay is merely a moral one, yet it is an obligation which could once have been enforced and has only been rendered simply moral by reason of its having become devoid of legal remedy, and the promise to pay such a debt is binding (*k*).

An executory consideration must generally have been performed before an action can be brought on the contract.

With regard to an executory consideration, as it consists of something to be done at a future day, of course before an action can be maintained on the contract the future act forming the consideration must have been done by the plaintiff, or he must at least have been always ready and willing to do it.

The doing of an act a person was bound to do is no consideration.

The doing by a person of an act which he was already under a legal obligation to do, cannot form a consideration; thus a promise by a master of a ship to pay his seamen a sum in addition to their proper wages as an incitement to extra exertion on sudden emergency is not binding, for they are as seamen bound to do everything in their power (*l*).

As to an impossible consideration.

If the consideration stated for a promise is of such a nature as to be either legally or morally impossible, no promise founded on it will be binding (*m*). By a consideration legally impossible, is meant where a person

(*j*) Note to *Wennall v. Adney*, 3 B. & P. 252.

(*k*) As to limitation generally, see *post*, pp. 209—216.

(*l*) *Harris v. Carter*, 3 E. & B. 559; Chitty on Contracts, 42.

(*m*) Chitty on Contracts, 44, 45.

agrees to do an act which is contrary to the law (n); and by a consideration morally impossible, is meant where a person agrees to do an act which is simply an absurdity as being naturally and physically impossible, "As if the consideration be a promise that A. shall go from Westminster to Rome in three hours" (o). Here this is manifestly an absurdity and an impossibility, and from such a promise no benefit or advantage can result to the other party, so that it in fact amounts to no consideration at all. And although a consideration was not originally impossible, yet if from circumstances that occur it afterwards becomes so, the rule equally applies (p).

Fourthly. As to the object of the contract. This must be neither of an illegal nor immoral nature, either directly or indirectly, but if there are legal and illegal acts stipulated for in a contract, and they are clearly divisible, it will not render the whole contract void (q). The object of a contract must not be illegal or immoral.

To a deed, writing is, of course, an essential, for to constitute a deed there must be a writing actually sealed and delivered; but for simple contracts at common law no writing was necessary, nor is it at the present day, except in those cases in which it has been rendered necessary either by statute or custom. Those cases in which writing is necessary are generally of great practical importance, and may be stated to be chiefly as follows:— Cases in which writing is necessary.

1. In cases coming within the Statute of Frauds (r), and Lord Tenterden's Act (s).

(n) See *Haslam v. Sherwood*, 10 Bing. 540; *Harvey v. Gibbons*, 2 Lev. 161.

(o) Chitty on Contracts, 44, 45.

(p) See *Chanter v. Leese*, 4 M. & W. 295.

(q) See further as to illegal contracts, *post*, ch. ix.

(r) 29 Car. 2, c. 3.

(s) 9 Geo. 4, c. 14.

2. In the case of grants of annuities.
3. Contracts relating to sale or assignment of copy-rights.
4. Contracts relating to sale or transfer of ships; and,
5. Bills of exchange, promissory notes, and other like negotiable instruments.

Of the above cases, by far the most extensive is that numbered 1, being cases coming within the Statute of Frauds and Lord Tenderden's Act.

Of the former statute the most important sections are the 1st, 2nd, 3rd, 4th, 7th, and 17th.

Provisions of
the 1st, 2nd,
and 3rd sec-
tions of the
Statute of
Frauds.

The 1st section provides that "all leases, estates, interests of freehold or term of years or any uncertain interest of, in, to or out of any messuages, manors, lands, tenements, or hereditaments made or created by livery and seisin only or by parol, and not put in writing, and signed by the parties so making or creating the same or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect, any consideration for making any such parol leases or estates, or any former law or usage, to the contrary notwithstanding." The 2nd section, however, goes on to provide, "Except, nevertheless, all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount unto two-third parts at least of the full improved value of the thing demised." The effect, therefore, of these two sections

taken together is, that a lease by parol can only be made where it does not exceed three years from the making thereof (*t*). By the 3rd section all assignments and surrenders of leases must be in writing, signed by the persons or their agents authorized in writing.

The 7th section, perhaps, should hardly be mentioned in the present work, but it may be noticed that it provides that trusts of land or any interest in land must be in writing; but it does not require any writing to create a trust of purely personal property. There then remain the 4th and 17th sections to be considered.

Provisions of
the 7th section.

The 4th section provides that "no action shall be brought (1) to charge any executor or administrator upon any special promise to answer damages out of his own estate, or (2) to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, or (3) to charge any person upon any agreement made upon consideration of marriage, or (4) upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, or (5) upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action is brought or some memorandum or note thereof shall be in writing, signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

Provisions of
the 4th section.

With regard to promises by executors or administrators to answer damages out of their own estate, it need only here be said that, although the writing required by the statute exists, yet there must also be some valuable consideration for the promise; thus the

As to contracts
by executors or
administrators
to answer
damages out of
their own
estates.

(*t*) See further hereon, *post*, ch. iii. p. 52.

mere fact of an executor or administrator stating in writing that he will see a certain debt paid is not sufficient to render him personally liable in the absence of some consideration, *e.g.*, the giving of time or forbearing of proceedings by the creditor.

As to guarantees.

But the next kind of contract mentioned in the 4th section, viz., guarantees or agreements to answer for the debt, default, or miscarriage of another person demands a more lengthened consideration.

Birkmyr v. Darnell.

In the first place must be observed the decision in the leading case of *Birkmyr v. Darnell* (u), to the effect that a promise to answer for the debt, default, or miscarriage of another, for which that other person remains liable, is within the statute, and must be in writing; but if that other does not remain liable, then it is not within the statute, and need not be in writing. To illustrate this, the following example may be given: A. goes into a shop with B., and says to the shopkeeper, "Supply goods to B., and if he does not pay you for them, then I will." Here this is within the statute; for it is a guarantee, and to render A. liable it must be reduced into writing. But if A. goes into a shop with B., and says, "Supply goods to B., and charge them to me," here this is not within the statute, for it is no guarantee, but a direct sale to A., the goods being by his direction sent to B., and therefore, to render A. liable, there need be no writing (x).

A promise made to a debtor himself is not within the Statute of Frauds.

Again, if the promise is made to the debtor himself, it is not within the statute, for the statute only applies to promises made to the person to whom another is answerable (y). A guarantee may be made for future advances, and may be made out from different instru-

(u) 1 S. L. C. 326; Salkeld, 27.

(x) Unless, indeed, it comes within the 17th section of the Statute of Frauds, as to which, see *post*, ch. iv. p. 75 *et seq.* The question as to whether words used do or do not amount to a guarantee is one for the determination of the Court, not the jury: *Bank of Montreal v. Munster Bank*, 11 Ir. Rep. C.L. 47.

(y) *Eastwood v. Kenyon*, 11 A. & E. 446.

ments provided they are connected *inter se*, without the necessity of any parol evidence (z). A guarantee formerly came within the common rule (a) that the consideration as well as the promise must appear on the face of the instrument, but in consequence of the difficulty of setting forth the consideration in a sufficient manner to satisfy the courts of law, this rule proved to be a grievance to the mercantile community (b), and, in consequence, the Mercantile Law Amendment Act 1856 (c), provides that a guarantee shall be valid without the consideration appearing on its face. The same statute (sect. 5) provides that on a surety paying the principal's debt he shall be entitled to have assigned to him, or a trustee for him, every judgment or other security held by the creditor, notwithstanding the same may be deemed at law satisfied by his payment or performance, and such person shall be entitled to stand in the place of the creditor; before this statute the surety only had a right to collateral securities and not to the principal security itself. If a person is surety to or for a person he is liable to, or for that person only, and not for any partner, and if surety to or for a firm consisting of two or more persons, or a single person trading under the name of a firm, he is not liable after any alteration in or addition to the persons or person constituting such firm (d).

The consideration need not now appear on the face of a guarantee.

Rights of a surety on paying his principal's debt.

Surety to or for a firm, &c.

The following acts will operate to discharge a surety:—

- (1) any fraudulent misrepresentation or concealment (e);
- (2) the failure of an intended co surety to execute (f);
- (3) the creditor's connivance at principal's default or his laches, but mere delay in giving a voluntary

Acts which will operate to discharge a surety.

(z) See *ante*, p. 28, 29; and the case of *Boydell v. Drummond*, 11 East, 142, there referred to.

(a) Stated *ante*, pp. 31, 32.

(b) 1 S. L. C. 330; *ante*, p. 32.

(c) 19 & 20 Vict. c. 97, s. 3.

(d) 19 & 20 Vict. c. 97, s. 4.

(e) *Railton v. Matthews*, 10 C. & F. 934.

(f) *Evans v. Brembridge*, 25 L. J. (Ch.) 334.

forbearance will not be sufficient laches (*g*); (4) non-performance of conditions by creditor; (5) the discharge of the principal; (6) any alteration of the terms of the contract between the creditor and the principal, which may have the effect of interference for a time with his remedies against the principal debtor (*h*); (7) a binding agreement by the creditor with the principal to give time to the principal, unless at the time the creditor and the principal stipulate that it shall not discharge the surety, then (even although not by his consent) it will not discharge him (*i*). A mere voluntary giving of time, without any obligation to do so, will not operate to discharge a surety (*k*).

*Ex parte
Jacobs.*

On a bill of exchange the party primarily liable is the acceptor, and the other persons liable thereon stand in the position of sureties for him, as is hereafter explained (*l*), and the rule therefore as to what acts will operate to discharge a surety applies to the persons other than the acceptor liable on a bill. Upon this point the important recent decision of *Ex parte Jacobs* (*m*) should be noticed. In that case an acceptor of a bill had filed a petition for liquidation or composition by arrangement under the Bankruptcy Act, 1869; and at the meeting of creditors the holder of the bill signed a resolution agreeing to accept a composition, under which resolution the acceptor was discharged, and the question was whether this operated to discharge the drawer of the bill from claims on the bill. It was held by the Court of Appeal that it did not, for that the acceptor must be considered as discharged by operation of law, and not by the creditor's voluntary act, even

(*g*) *Phillips v. Fordyce*, 2 Chit. 676; *Strong v. Foster*, 25 L. J. (C.P.) 106.

(*h*) *Watts v. Shuttleworth*, 10 W. R. 132; *Tucker v. Laing*, 2 Kay & J. 745.

(*i*) *Owen v. Homan*, 4 H. of L. Cas. 997; *Boaler v. Mayor*, 19 C. B. (N.S.) 76; *Green v. Wynn*, 4 Ch. App. 204.

(*k*) *Bell v. Banks*, 3 M. & G. 258.

(*l*) See *post*, pp. 125-128.

(*m*) L. R. 10 Ch. Ap. 211.

although such creditor had attended and expressly voted for the acceptance of the composition. No doubt the principle of this decision applies to all cases of suretyship, so that if any principal debtor files a petition for liquidation or composition, and a composition is accepted, the creditor still has a claim over against a surety (*n*).

An agreement to give a guarantee is within the statute and must be in writing (*o*). Agreement for guarantee.

An agreement made in consideration of marriage does not mean the actual promise of marriage (for that would be contrary to the general usages of mankind), but means contracts for the doing of collateral acts in consideration of marriage (*p*). An action, therefore, for breach of promise of marriage may be brought, although not evidenced by writing, so only that it can be clearly proved, and the evidence of the plaintiff (as is hereafter mentioned (*q*)) is corroborated in some material respect. Contracts as to land are treated of in the next chapter (*r*). Meaning of an agreement made in consideration of marriage.

The term "an agreement not to be performed within a year from the making thereof," on the face of it seems clear enough, but a more careful consideration will shew the student that doubts may arise on its meaning. There may be some contracts which it is utterly impossible can be performed within the year, and others which may or may not, according to circumstances, be carried out within the year—is the statute to apply to all or which of these? The question is answered by the leading case of *Peter v. Compton* (*s*), which decides As to agreements not to be performed within a year.
Peter v. Compton.

(*n*) This case of *Ex parte Jacobs* followed *Meyrath v. Gray*, L. R. 9 C. P. 216, and the case of *Wilson v. Lloyd*, L. R. 16 Eq. 60, was expressly disapproved of.

(*o*) *Mallett v. Bateman*, L. R. 1 C. P. 163.

(*p*) Broom's Coms. 383, 384.

(*q*) See *post*, Part iii. ch. ii. p. 394.

(*r*) See *post*, ch. iii. p. 48 *et seq.*

(*s*) 1 S. L. C. 351; *Skinner*, 353.

Where every
thing on one
side is per-
formed within
a year.

that this clause in the Statute of Frauds only means and includes agreements which from their terms are actually incapable of performance within the year, and does not include contracts which may or may not, according to circumstances, be performed within that period. The facts in that case were that the defendant had entered into an agreement with the plaintiff that, in consideration of one guinea then paid him by the plaintiff, that he would pay the plaintiff a certain greater sum upon the day of his marriage. The marriage did not happen within the year, but it was decided that there was nothing in this contract rendering it incapable of being performed within the year, and that, therefore, an action would lie, although not reduced into writing. With regard to this kind of contract, however, it has also been decided that an agreement is not within the statute provided that all that is to be done by one of the parties is to be done within a year, so that where under a lease in consideration of £50 to be laid out in alterations by the landlord, the tenant agreed to pay an additional rent during the residue of the whole term of the lease, it was held that as the laying out of the £50 was to be within a year, the agreement was not within the statute and need not be in writing (*t*), so that, had this been considered the law at the time of the decision in *Peter v. Compton* there would have been no occasion to decide that case upon the ground that the possibility that the marriage might happen within the year took it out of the statute.

A contract for
a year's service
from a sub-
sequent day
must always be
in writing.

An instance, however, of a contract within the statute, and therefore requiring to be in writing, may be found in an agreement for a year's service from a day subsequent to the date of the contract, even if only from the next day (*u*), and if a contract appears on its face to

(*t*) *Donnellan v. Read*, 3 B. & Ad. 899.

(*u*) *Bracegirdle v. Heald*, 1 B. & A. 722.

be intended to extend over a year, although it may contain a condition by which it may be put an end to within the year, yet it is within the statute, and must be in writing (*x*).

It is, however, sometimes very difficult to tell when a contract is or is not within the statute, and with regard to some of the cases it is, in the author's opinion, very difficult, if not impossible, to reconcile them with each other (*y*). And as the rules of Equity now prevail (*z*), there must be now many cases in which an action may be brought on the ground of part performance which could not formerly have been maintained (*a*).

The 17th section of the Statute of Frauds provides for contracts for the sale of goods either being in writing or as therein mentioned, but this section is given and dealt with fully in a subsequent chapter (*b*).

The Statute of Frauds, by its provisions, does not require any formal contract fully and technically precise, but any memorandum is sufficient which contains, either expressly or by reference, the terms of the agreement, and any written memorandum must shew not only who is the person to be charged, but also who is the party in whose favour he is to be charged (*c*). The statute, too, does not require that this contract or memorandum should be actually signed by both the parties to it, but it will be sufficient if only signed by the person to be charged, for that is all that is said by the statute; and although the foot or end is the most

29 Car. 2, c. 3
sect. 17.

What is a sufficient memorandum to satisfy the Statute of Frauds.

(*x*) *Birch v. Liverpool*, 9 B. & C. 392; *Giraud v. Richmond*, 2 C. B. 835.

(*y*) See particularly *Murphy v. Sullivan*, 11 Ir. Jur. (N.S.) 111, where it was held that a contract to support a child during its life need not be in writing, although in *Sweet v. Lee* (3 M. & Gr. 452) it had been held that a contract for payment of an annuity must be in writing, though it may determine within the year by the death of the annuitant. See also hereon *Knowlman v. Bluet*, L. R. 9 Ex. 1.

(*z*) Jud. Act, 1873, sect. 25 (11).

(*a*) *Lester v. Foxcroft*, 1 Wh. & T. L. C. 828.

(*b*) *Post*, ch. iv. p. 75.

(*c*) Chitty on Contracts, 66; Benjamin's Sale of Personal Property, 169.

When an agent
must be autho-
rized in
writing.

proper place for the signature, yet it need not be there—where a person drew up an agreement in his own handwriting, commencing “I, A. B., agree,” it was held that this was sufficient signature, although the name A. B. was not subscribed at the end (*d*). Again, it has been held that when a person has usually printed his name, as, for instance, if there is a memorandum on a bill-head containing the party’s printed name, this may be a sufficient signature (*e*). It is, of course, in all these cases a question of the intention of the party whether the name should operate as a signature (*f*). The 4th and 17th sections do not require an agent who signs an agreement under them to be authorized by writing; the 1st and 3rd sections do. An agent, to execute a deed, must receive his authority by deed, though it has been held that, in the case of two joint contractors by deed, one may execute for himself and the other, in the presence of that other, without any authority from him in writing (*g*). One party to a contract cannot be the agent of the other but one agent may sign for both parties, as in the case of a broker or auctioneer.

9 Geo. 4, c. 14. By Lord Tenterden’s Act (*h*) it is provided that no acknowledgment by a debtor to take a case out of the Statutes of Limitations shall be binding unless in writing, signed by the debtor, or (by the Mercantile Law Amendment Act, 1856 (*i*)) by his agent; and it may be noticed here that any such acknowledgment must either contain a promise to pay, or be of such a nature that a promise to pay may be implied, so that where the defendant wrote “I know that I owe the money,

(*d*) *Knight v. Crockford*, 1 Esp. 190, referred to by Lord Eldon in *Saunderson v. Jackson*, 2 B. & P. 138.

(*e*) *Saunderson v. Jackson*, 2 B. & P. 138; *Schneider v. Norris*, 2 Maule & S. 280.

(*f*) *Caton v. Caton*, L. R. 2 H. of L. Cas. 127.

(*g*) *Ball v. Dunsterville*, 4 T. R. 313.

(*h*) 9 Geo. 4, c. 14, s. 1.

(*i*) 19 & 20 Vict. c. 97, s. 13.

but I will never pay it," this was held to be no sufficient acknowledgment (*j*). Lord Tenterden's Act (*k*) also provides that no action shall be brought to charge any person by reason of any representation as to the character, conduct, credit, ability, trade, or dealing of any other person, that he may obtain money or goods upon credit, unless in writing, signed by the person to be charged therewith.

An annuity is a yearly payment of a certain sum of money granted to another in fee, for life, or years, and charging the person of the grantor only or his person and estate, in which latter case it is usually termed a rent-charge (*l*); and by the Annuity Act (*m*) writing is required for the grant of an annuity. As to an annuity.

Copyright is the sole and exclusive liberty of multiplying copies of an original work or composition (*n*); and by the Copyright Act (*o*) writing is necessary, it being assignable by an entry of the transfer in the registry in the manner prescribed by the Act. As to copyright.

By the Merchant Shipping Act, 1854 (*p*), a registered ship, or any shares therein, must be transferred by bill of sale under seal in the form given, and attested by a witness and registered. As to ships.

Bills of exchange, promissory notes, and other like negotiable instruments are required to be in writing and signed, not by statute, but by the custom of merchants.

(*j*) *A'Court v. Cross*, 3 Bing. 328.

(*k*) 9 Geo. 4, c. 14, s. 6; see also *post*, pp. 227, 228.

(*l*) Brown's Law Dict. 25.

(*m*) 53 Geo. 3, c. 141.

(*n*) Brown's Law Dict. 92; see further as to Copyright, *post*, p. 159.

(*o*) 5 & 6 Vict. c. 45.

(*p*) 17 & 18 Vict. c. 104, ss. 55 & 57; see also as to Ships, *post*, p. 150 *et seq.*

CHAPTER III.

OF CONTRACTS AS TO LAND, AND HEREIN OF LANDLORD
AND TENANT.

Contracts for
sale of land
must always
be in writing
under 29 Car. 2,
c. 3.

Chancery
would carry
out a parol
contract, how-
ever, in three
cases.

Effect of Judi-
cature Act,
1873.

The statute
extends to any
interest in
land.

It was stated in the previous chapter that contracts for the sale of lands, tenements, or hereditaments, or any interest in or concerning them, must be in writing, this being one of the contracts specified by the 4th section of the Statute of Frauds (29 Car. 2, c. 3). Any sale of land, even though by auction, must, therefore be in conformity with the provisions of this section, as a general rule, though it should be mentioned that sales under a decree of the Court of Chancery have been held not to be within the statute (*q*); and as the Court of Chancery has been in the habit of decreeing specific performance of a parol contract in three cases, viz.: (1) Where set out and admitted in the pleadings and the defendant does not set up the statute as a bar. (2) Where prevented from being reduced into writing by the fraud of the defendant; and (3), After certain acts of part performance (*r*); now, in consequence of the Judicature Act, 1873 (*s*), in any of such cases effect would be given to the contract in all divisions of the High Court of Justice.

But the statute does not mention merely contracts for the sale of lands, but also "any interest in or concerning them;" and it is frequently a point of some nicety to determine what is and what is not an interest in land within the statute; a good instance of what

(*q*) *Attorney-General v. Day*, 1 Ves. Sen. 218.
(*r*) *Snell's Principles of Equity*, 530.
(*s*) 36 & 37 Vict. c. 66, s. 25 (11).

has been held to be, and what has been held not to be an interest in land, is found in the decisions that a contract for the sale of growing grass upon land is an interest in land within the statute (t), but a contract for the sale of growing potatoes is not. The rule on this point is stated in Mr. Chitty's work on Contracts (u) ^{What is an interest in land.} as follows: "With respect to emblements, or *fructus industriales*, a contract for the sale of them while growing, whether they have arrived at maturity or not, and whether they are to be taken off the ground by the buyer or seller, is *not* a contract for the sale of an interest in land; but a contract for the sale of a crop which is the natural produce of the land if it be unripe at the time of the contract, and is to be taken off the land by the buyer, is a contract for the sale of an interest in land within the statute." To determine accurately what is an interest in land within this section and what is not, is, however, frequently a most difficult matter; indeed a learned judge (x) once stated that there was no general rule laid down in any of the cases that was not contradicted by some other, and in a very recent case (y) Lord Coleridge said: "I despair of laying down any general rule that can stand the test of every conceivable case." It has been held that a contract for the sale of growing timber, to be cut by the vendor or vendee, if it is to be cut immediately, or as soon as possible, does not confer any interest in land, and therefore is not within the section now under discussion, though if the price exceeds £10 it is within the 17th section (z), as being a contract for the sale of goods (a). In the case of *Marshall v. Green* above referred to, Lord Chief Justice Coleridge, in deciding that timber to be taken away immediately is not an

(t) *Crosby v. Wadsworth*, 6 East, 602; *Evans v. Roberts*, 5 B. & C. 829.

(u) Page 276.

(x) Lord Abinger, in *Rodwell v. Phillips*, 9 M. & K. 501.

(y) *Marshall v. Green*, L. R. 1 C. P. Div. 38.

(z) As to which, see *post*, ch. iv.

(a) *Smith v. Surman*, 9 B. & C. 561; *Marshall v. Green*, L. R. 1 C. P. Div. 35.

interest in land within this section, said: "Planted trees cannot in strictness be said to be produced spontaneously, yet the labour employed in their planting bears so small a proportion to their natural growth that they cannot be considered as *fructus industriales*, but treating them as not being *fructus industriales*, the proposition is that where the thing sold is to derive no benefit from the land and is to be taken away immediately, the contract is not for an interest in land. Here the contract was that the trees should be got away as soon as possible, and they were almost immediately cut down. Apart from any decision on the subject, and as a matter of common sense, it would seem obvious that a sale of twenty-two trees, to be taken away immediately, was not a sale of an interest in land, but merely of so much timber" (b). From these observations it would seem that if timber is not to be immediately taken away it will be an interest in land. The following contracts may also be mentioned as having been decided *not* to be an interest in land within the statute:—

Particular
cases upon
the point.

A contract for the sale of railway shares.

A contract by a landlord *after* granting a lease to make improvements in consideration of the tenant agreeing to pay an additional sum per annum.

An agreement for lodging and boarding in a house.

An agreement by a landlord with a quitting tenant to take the tenant's fixtures (c)

Title to be
shewn to land.

On a contract for sale of land, in the absence of stipulations to the contrary, the title was formerly sixty

(b) *Marshall v. Green*, L. R. 1 C. P. Div. 39, 40. In a case of *Scovell v. Boxall*, 1 Y. & J. 396, it was held that a contract for the sale of growing underwood was a contract or sale of an interest in land within this section, but in that case it did not appear when it was to be cut, and probably had it been that the underwood was to have been cut immediately it would have been decided the other way.

(c) See Chitty on Contracts, 275–279. It has been held that an agreement requires just as much to be in writing if the interest in the land moves to the plaintiff, as it would if it moved from him: *Ronayne v. Sherrard*, 11 Irish Reps. (C. L.) 146.

years, but now, under the Vendors and Purchasers Act, 1874 (*d*), in the completion of any contract made after December 31, 1870, it is forty years (*e*), and if it is a leasehold property the purchaser cannot call for the freeholder's title (*f*). On a contract for the sale of land the vendor is only bound to disclose to the purchaser facts relating to the property which in the ordinary course of events he could not discover for himself, and, generally speaking, a purchaser is not under any obligation to disclose to a vendor facts which he is aware of which enhance the property's value, *e.g.*, his private knowledge of the existence of minerals under the land.

With regard to a proper signature within the statute, one party to the contract cannot be the agent of the other, but a third person—*e.g.*, the auctioneer at a sale—can be the agent of both parties. On a sale of land the name of the vendor or some sufficient description of him should be inserted before the contract is signed. The mere term "vendor" is not a sufficient description (*g*), but the word "proprietor" has been held sufficient (*h*).

One party to a contract cannot sign for the other.

A tenancy may exist in various different ways, as if one holds either for a fixed period, or simply from year to year, or at will or sufferance. By the 1st section of the Statute of Frauds all leases, estates, interests of freehold or terms of years, or any uncertain interest of, in, to or out of land, must be in writing signed by the persons or their agents *authorized by writing*, or shall have the force and effect of estates at will only (*i*). The 2nd section excepts from this provision leases not exceeding three years from the making thereof, at two-

Different ways in which a tenancy may exist.

Statute of Frauds as to leases,

(*d*) 37 & 38 Vict. c. 78.

(*e*) Ibid. s. 1.

(*f*) Ibid. s. 2.

(*g*) *Potter v. Duffield*, L. R. 18 Eq. 4.

(*h*) *Rossiter v. Miller*, L. R. 5 Ch. Div. 648; see also *Catling v. King*, L. R. 5 Ch. Div. 660.

(*i*) This section is set out verbatim *ante*, p. 38.

and assign-
ments of leases.

thirds of the full improved value (*k*). And by the 3rd section all assignments of leases (not being copyhold or customary property) must in a like way, as is provided in the 1st section as to leases, be in writing. By 8 & 9 Vict. c. 106 (*l*), every lease required by law to be in writing, and assignments of leases (not being copyhold) shall be void at law unless made by deed.

An agreement
for a lease
must always
be in writing.

The student will observe that though, under the 2nd section, leases not exceeding three years may be made by parol, yet, by force of the 4th section, any agreement for a lease, for however short a time, must be in writing.

Statute pro-
vides that
leases not in
writing shall
have only the
effect of estates
at will.

As above stated, the strict provision of the statute is that leases which it requires to be by writing, and which are not, are to have the force and effect of estates at will only; but although this is so, to simply put that fact in answer to a question on the effect of such a lease would be useless. The well-known case of *Clayton v. Blakey* (*m*) decides the point, that notwithstanding the said enactment, yet if a tenant under such a lease enters and pays rent, it may serve as a tenancy from year to year. In the first instance, no doubt, all the tenant has is a tenancy at will in strict conformity with the statute, but the Court leans against that tenancy and in favour of a tenancy from year to year (*n*), and therefore it is afterwards converted into that. Further, if a person holds under a lease which from any cause is void under the Statute of Frauds, or from not being as now required to be by deed (*o*), or, if a tenant holds over after the expiration of his lease, and continues to pay a yearly rent, he will hold under the terms of the lease in other respects so far as

Clayton v.
Blakey.

Doe d. Rigge
v. Bell.

(*k*) This section is set out verbatim, *ante*, p. 38.

(*l*) Sect. 3.

(*m*) 2 S. L. C. 106; 8 T. R. 3.

(*n*) *Richardson v. Langridge*, Tudor's Con. Cases, 4; 4 Taunt. 128.

(*o*) By 8 & 9 Vict. c. 106, s. 3.

they are applicable to the new tenancy from year to year (p).

A yearly tenant is entitled to and must give a *reasonable* notice to quit, which has been held to mean six calendar months' notice, ending at the period at which his tenancy commenced. If, however, it is a tenancy under the Agricultural Holdings Act, 1875, a year's notice is necessary expiring at the end of the current year of the tenancy (q). To determine a weekly tenancy, again, a reasonable notice is required, but it is doubtful what is meant by a reasonable notice, and the safest plan is to give a week's notice (r); to determine a tenancy in lodgings also all that is required is a reasonable notice according to the circumstances of the case. Though a written notice to quit is always advisable, a parol tenancy may be determined by a verbal notice (s). Where several premises are let under one common rent, notice to quit part of them only cannot be given (t), and if a tenant holds under a lease made by two or more joint lessors they should all join in giving notice to quit, but notice to quit by one on behalf of all, whether authorized by the others or not, will put an end to the tenancy (u). As stated, if a tenant holds over after the expiration of his lease he may by payment of rent be converted into a yearly tenant, and until then he is a tenant at sufferance; but if a term determines and the landlord has made a demand and given notice *in writing* for possession, and the tenant holds over, he is liable to pay double the yearly *value* of the premises, unless he had a *bonâ fide* belief that he had a right to so hold over (v); and if a tenant gives notice of quitting to his landlord and

Notice on
determining
tenancy.

(p) *Doe d. Riggs v. Bell*, 2 S. L. C. 100; 5 T. R. 471.

(q) 38 & 39 Vict. c. 92, s. 51, and see *Wilkinson v. Calvert*, L. R. 3. C. P. Div. 369.

(r) See hereon, 2 S. L. C. 112.

(s) *Woodfall's Landlord and Tenant*, 311.

(t) *Ibid.*

(u) *Tudor's Con. Cases*, 29.

(v) 4 Geo. 2, c. 28, s. 1.

does not quit at that time, he is liable to pay double the yearly rent of the premises (*w*). If a landlord gives notice to his tenant to quit or pay an increased rent and the tenant does not quit, his agreement to pay the increased rent will be implied (*x*).

Tenancy at will arising by construction of law.

Provision of Judicature Act, 1873, as to position of mortgagors.

A tenant is estopped from disputing his lessor's title.

Liability of tenant from year to year for repairs.

A tenancy at will sometimes arises by the construction of the law, *e.g.*, in the case of a mortgage, the courts of law always considered the mortgagor as simply the tenant at will of the mortgagee and liable to be ejected at any time, so that he could not bring any action in respect of the mortgaged lands, although he continued in possession of them. It is, however, now provided by the Judicature Act, 1873 (*y*), that "a mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person."

A tenant is estopped from disputing his lessor's title, therefore where a tenant acquires possession under a person who claims as devisee, it is not competent for him to set up any objection to the devise. Payment of rent impliedly admits a tenancy (*z*).

A tenant from year to year in the absence of agreement is not liable to make good injuries happening from accidental fire, wear and tear of time, or the like, but an act arising from his own voluntary negligence he is liable for, *e.g.*, to repair broken windows. Where a tenant covenants to repair, his liability to a great

(*w*) 11 Geo. 2, c. 19, s. 18.

(*x*) See *ante*, pp. 18, 19.

(*y*) 36 & 37 Vict. c. 66, s. 25 (5).

(*z*) Chitty on Contracts, 305.

extent depends upon the state of the premises at the time of his covenant, for though he would not be justified if they were in actually bad repair in so leaving them, yet, with regard to the extent of the repairs to be done it may be stated generally that he will only be obliged to keep them in as good a condition as they were at the time of the demise; if the premises are burnt down, under such a covenant he will have to reinstate them unless the contrary has been provided. If, however, a fire is caused by any person's gross negligence such person is liable for it to the person injured. In the absence of express agreement a landlord is not under any obligation to repair the demised premises, and it seems that the fact of premises becoming uninhabitable from the want of proper repairs will not entitle the tenant to quit without notice, and is no answer to an action for the rent. With regard to farms, a promise is implied by the law on the part of a yearly tenant to use the farm in a husbandlike manner and cultivate it according to the custom of the country (a).

Landlord
not bound to
repair.

Property tax is always borne by the landlord, and any contract by the tenant to bear it is void; the tenant should in the first instance pay it, and is then entitled to have it allowed to him out of his rent (b). It should also be noticed that tithe rent-charge is not a charge upon the person of the owner or occupier but upon the land, and, therefore, in the absence of agreement to the contrary, a tenant paying it may deduct it from his rent.

Property tax
always borne
by landlord.

Although there may be nothing in a lease to that effect a tenant may sometimes by custom have certain rights, on the ground that the parties have contracted with reference to that custom, and an implied contract has been thus created (c). This often occurs in the case

A tenant may
sometimes
have rights by
custom.

(a) See generally hereon Woodfall's Landlord and Tenant, 548-564.

(b) 5 & 6 Vict. c. 35, s. 103.

(c) See *ante*, pp. 18, 19.

*Wigglesworth
v. Dallison.*

of farming tenants with reference to the custom of the country as to their rights on giving up possession of their farms. If a lease contains any particular stipulations as to the manner in which a tenant is to quit, and what he is to be entitled to on quitting, then the rule *Expressum facit cessare tacitum* applies, and no custom can have any effect; but if, though there is a lease, it is silent on this point, then, as was decided in the case of *Wigglesworth v. Dallison* (d), the tenant may take advantage of the custom.

Fixtures.

Meaning of
the term.

Must be re-
moved during
tenancy.

Questions frequently arise between landlord and tenant as to the right to fixtures. The term fixtures is used sometimes with different meanings; strictly speaking, it signifies things affixed to the freehold, but it may also be used as signifying chattels annexed to the freehold, but which are removable at the will of the person who annexed them (e). The rule at common law as to things affixed to the freehold is expressed by the maxim of our law, *Quidquid plantatur solo, solo cedit*; but this rule, being found to operate in discouragement of trade, has been gradually much mitigated. It may be stated generally that fixtures erected for the purposes of trade, ornament, or domestic use, and also agricultural fixtures (f), may be removed by a tenant as against his landlord, and it may in particular cases happen that custom gives a tenant a wider right than he would ordinarily have. When a tenant has the right to remove fixtures, the removal by him must be during his tenancy, or such further period as he holds under a right to consider himself tenant (g) i.e., whilst permitted by the landlord to remain in possession, and if he does not remove them during that time he will lose his right to them, for they then become a gift in law to the landlord, unless indeed the landlord after-

(d) 1 S. L. C. 594; Dougl. 201.

(e) 2 S. L. C. 189.

(f) 14 & 15 Vict. c. 25; 38 & 39 Vict. c. 92, s. 53.

(g) *Weeton v. Woodcock*, 7 M. & W. 14.

wards gives a licence to the tenant to enter to remove the fixtures, and such a licence would not be good unless under seal (*h*).

As before stated, originally, under the maxim *Quid- Originally no fixtures could be removed, but the old rule now mitigated.* *quid plantatur solo, solo cedit*, nothing in the nature of a fixture could be removed and the mitigations of the old rule have arisen gradually; the first was in favour of *trade* fixtures, and subsequently other cases extended it to *ornamental* and *domestic* fixtures. There have been a very great number of cases upon this subject and amongst the articles that have been decided to be removable by the tenant may be mentioned as instances the following:—Chimney-glasses, sheds, blinds, ornamental chimney-pieces, wainscots, shelves, counters, pumps, partitions, shrubs and trees planted for sale (*i*). The fixtures, if removable, must be taken away without material damage to the inheritance, and the right of removal is, of course, liable to be controlled by express contract, so that, for instance, if a tenant covenants to keep in repair all erections built, or thereafter to be built, and surrender them at the end of the term this will prevent him removing things which but for the covenant he might have removed (*k*).

Under the exception to the common law rule in *Elwes v. Mawe*. favour of trade fixtures, it was decided in *Elwes v. Mawe* (*l*) (which is a case very generally quoted and referred to on the subject of fixtures), that this would not apply to allow tenants in agriculture to remove things erected for the purposes of husbandry, and Lord Ellenborough, in delivering the opinion of the Court to that effect said:—"To hold otherwise, and to extend the rule in favour of tenants to the latitude contended

Reason of agricultural fixtures not being removable as trade fixtures.

(*h*) *Roffey v. Henderson*, 17 Q. B. 574.

(*i*) See a list of things decided to be removable and not removable in Chitty on Contracts, pp. 330–333.

(*k*) *West v. Blakeway*, 2 M. & G. 729; *Penry v. Brown*, 2 Stark, 403.

(*l*) 2 S. L. C. 169; 3 East, 38.

Provision of
14 & 15 Vict.
c. 25.

Provision of
38 & 39 Vict.
c. 92, s. 53.

for by the defendant, would be, as appears to me, to introduce a dangerous innovation into the relative state of rights and interests holden to subsist between landlords and tenants. But its dangers or probable mischief is not so properly a consideration for a Court of law as whether the adoption of such a doctrine would be an innovation *at all*; and being of opinion that it would be so, and contrary to the uniform current of legal authorities on the subject, we feel ourselves, in conformity to and in support of those authorities, obliged to pronounce that the defendant had no right to take away the erections stated and described in this case." These remarks shew the reason of the decision, and as the rule undoubtedly often worked hardship on tenants, it has been altered by the legislature, it being now provided by 14 & 15 Vict. c. 25 (*m*), that all buildings, engines, or the like, erected by the tenant for agricultural purposes, *with the consent in writing of the landlord*, shall remain the property of and be removable by the tenant, so that he do no injury in the removal thereof; provided that one month's notice in writing shall be given before removal to the landlord, who within that time is to have a right of purchasing at a value to be ascertained by two referees or an umpire. The Agricultural Holdings Act, 1875 (*n*), also contains a provision on this subject, with regard to tenants under that Act, as follows:—"Where after the commencement of this Act a tenant affixes to his holding any engine, machinery, or other fixture for which he is not under this Act or otherwise entitled to compensation, and which is not so affixed in pursuance of some obligation in that behalf, or instead of some fixture belonging to the landlord, then such fixture shall be the property of and removable by the tenant: Provided as follows: 1. Before the removal of any fixture the tenant shall pay all rent owing by him, and shall perform or satisfy

(*m*) Sect. 3.

(*n*) 38 & 39 Vict. c. 92.

all other his obligations to the landlord in respect of the holding. 2. In the removal of any fixture the tenant shall not do any avoidable damage to the building or other part of the holding. 3. Immediately after the removal of any fixture the tenant shall make good all damage occasioned to any building or other part of the holding by the removal. 4. The tenant shall not move any fixture without giving one month's previous notice in writing to the landlord of the intention of the tenant to remove it. 5. At any time before the expiration of the notice of removal, the landlord by notice in writing given by him to the tenant may elect to purchase any fixture comprised in the notice of removal, and any fixture thus elected to be purchased shall be left by the tenant, and shall become the property of the landlord, who shall pay the tenant the fair value thereof to an incoming tenant of the holding; and any difference as to the value shall be settled by a referee under this Act as in case of compensation, but without appeal. But nothing in this section shall apply to a steam engine erected by the tenant, if before erecting it the tenant has not given to the landlord notice in writing of his intention to do so, or if the landlord by notice in writing given to the tenant has objected to the erection thereof" (o).

The most noticeable difference between this provision and the one contained in 14 & 15 Vict. c. 25, is that under the earlier statute only fixtures erected with the *consent in writing* of the landlord can be removed. It must not be forgotten however that the operation of the Agricultural Holdings Act may be excluded, and the general practice since its passing has been to exclude it (p).

"As to the operation of the Statute of Frauds, 29 Car. 2, c. 3, upon contracts exclusively for the sale of fixtures, Contract for sale of fixtures need not be in writing.

(o) 38 & 39 Vict. c. 92, s. 53.

(p) See Prideaux, vol. i. p. 16.

of fixtures, it appears to be settled that such contracts are valid without the formalities prescribed by the 4th section of that statute. A transfer of fixtures simply, appears to be nothing more than a transfer of the right which the vendor has to sever certain chattels annexed to the soil, but not part of the freehold. Such transfer therefore passes no interest in the realty, and accordingly it does not come within the operation of the 4th section of the statute" (q); but it may be noticed that a contract for the sale of fixtures, if in writing, and they are above £5 in value, requires a stamp.

On the sale or mortgage of land fixtures pass without any special words.

When a mortgage of fixtures requires registration as a bill of sale.

Upon a sale or mortgage of land, fixtures will pass to the vendee or mortgagee, in the absence of any contrary intention; and with regard to the much-discussed question of whether a mortgage of land with fixtures requires to be registered as a bill of sale, it was prior to the Bills of Sale Act, 1878 (r), decided that it did not so require, unless the mortgagee had power given him to deal with the fixtures apart and separately from the land (s). Now, however, by that Act it is definitely provided (t) that "personal chattels" (which are the things as to which registration is required), shall include fixtures when separately assigned or charged, but not fixtures when assigned together with a freehold or leasehold interest in any land or building to which they are affixed (except trade machinery). If by the same instrument any freehold or leasehold interest as aforesaid is so conveyed or assigned, then the fixtures are not to be deemed separately assigned or charged, only because assigned by separate words or because power is given to deal with them apart from such freehold or leasehold interest. In any bankruptcy or liquidation taking place after this Act this provision is retrospective.

(q) Chitty on Contracts, 337.

(r) 41 & 42 Vict. c. 31.

(s) *Ex parte Barclay*, L. R. 9 Ch. App. 576; *Ex parte Daglish*, L. R. 8 Ch. App. 1072; on the Law of Fixtures generally, see Brown on Fixtures.

(t) Sect. 7.

The most apt and proper remedy of a landlord for the recovery from his tenant of the rent due is distress, which is a remedy by the act of the party, being the right the landlord has of entering and seizing goods for the purpose of liquidating the amount due to him, the word being derived from the Latin *distingo*. A right of distress besides for rent exists in the case of cattle taken *damage-feasant*, and here the reason for the remedy is tolerably plain, because the distrainer may be said to be acting on the compulsion of the trespass, but in the case of the distress for rent the reason why it is allowed is by no means so clear.

Distress.
What it is.

The following seem to be the requisites to the power of distress :—

Requisites to
enable a land-
lord to
distrain.

1. There must be an actual demise and not a mere agreement for a lease.

2. The rent must be certain, that is, the premises must be let at a fixed rent ; for if the tenant holds premises on a rent to be agreed on, or simply on their fair value, the landlord has no right of distress (u).

3. The rent must be in arrear ; and rent does not become *due* until the very end of the day on which it is payable ; but in the case of rent payable in advance, it has been decided to be in arrear directly the period for which it is payable commences.

4. The distrainer must have the reversion in him, either an actual reversion, or at the least a reversion by estoppel (x).

The general rule is that all moveable chattels on the demised premises at the time of the distress are liable to be seized, whether they are the property of the tenant or

All moveable
chattels can
be distrained ;
subject to
exceptions.

(u) Woodfall's Landlord and Tenant, 376.

(x) Brown, 121, tit. "Distress,"

*Simpson v.
Hartopp.*

of a stranger ; but this rule is subject to many exceptions. The leading case on the point of the exemption of things from distress is *Simpson v. Hartopp* (y) ; the case itself is only a direct decision to the effect that implements of trade are privileged from distress for rent if they be in actual use at the time, or if there be any other sufficient distress on the premises ; but in the judgment is contained a summary of the authorities upon the point generally. Instead of going into this case, it will be best to give a list of the principal things which at the present day are exempted from being taken in distress, and they are as follows :—

Things ex-
empted at the
present day
from being
taken in
distress.

1. Things in the personal use of a man.
2. Fixtures affixed to the freehold.
3. Goods of a stranger delivered to the tenant to be wrought on in the way of his ordinary trade.
4. Perishable articles.
5. Animals *feræ naturæ*.
6. Goods *in custodia legis*.
7. Instruments of a man's trade or profession though not in actual use, if any other sufficient distress can be found.
8. Beasts of the plough, instruments of husbandry, and beasts which improve the land, if any other sufficient distress can be found.
9. Loose money.
10. Lodgers' goods.

Difference
between

On the above the student's attention is particularly

(y) 1 S. L. C. 450 ; Willes, 512.

called to the exception numbered 3, for the purpose of his observing the difference on that point between an execution issued against goods and a distress. No goods of a stranger are liable to be taken in execution, but in distress they are, except they have been delivered to be wrought upon in the course of the person's ordinary employment. Thus, if a book is lent, and a distress or an execution is put in the lendee's house, the book is liable to be taken in the distress though not in the execution; but if the book is delivered to a bookbinder to be bound it is not liable to be taken either in distress or execution, for here the bookbinder has it to work upon in the way of his ordinary calling. Again, upon this point the student must particularly notice the exception numbered 10, being lodgers' goods.

In an execution a lodger's goods being goods of a stranger were never liable to be taken, but in the case of distress they were formerly so liable; and the exception in this latter case is contained in the Lodgers' Goods Protection Act, 1871 (z), which provides that in any distress by a superior landlord upon a lodger's furniture or goods for rent due to the landlord from his immediate tenant, the lodger may serve the landlord or his bailiff with a declaration (to which must be annexed an inventory of the furniture) that the immediate tenant has no property or beneficial interest in the goods, and that the same are the property of him, the lodger, and also setting forth whether any and what rent is due from the lodger to his immediate landlord, and the lodger may pay to the superior landlord or his bailiff the rent (if any) so due, or so much of it as may be sufficient to discharge the claim of such superior landlord; and if the landlord proceeds with the distress after the tenant has complied with these provisions, he is to be guilty of an illegal distress; and the lodger may apply to a justice of the peace for restoration of the goods.

distress and execution as to goods of a stranger.

Lodger's goods never could be taken in execution, but could in distress. Provisions of Lodgers' Goods Protection Act.

(z) 34 & 35 Vict. c. 79.

Dogs may
be taken in
distress.

Dogs, it would seem, are not now to be deemed included under the exemption numbered 5.

Bill or note
taken for rent
does not extin-
guish the right
of distress.

If a landlord takes a bill, note, or bond for his rent this is no extinguishment of his original right to the rent, for the rent is of a higher nature than either of those securities (a).

Semayne's Case.
Maxim:
"Every man's
house is his
castle."

Landlord may
follow goods
clandestinely
removed by
tenant.

It is said that "every man's house is his castle" (b), and, therefore, to make a distress the landlord or his bailiff must not break the house, and by breaking the house is meant not only the forcing open the door but even the opening of an unbolted window. A landlord, however, in making a distress is justified in opening an outer door in the way in which other persons are accustomed to use it; and when entry has once properly been obtained into a house inner doors may be forced open, and if the distrainer is afterwards turned out from possession he has a right to break the house to re-enter (c). It is provided by statute (d) that if a tenant fraudulently or clandestinely removes his goods after rent has become due, in order to avoid their being seized in a distress, the landlord may, if there is not a sufficient amount of other distrainable property left, within thirty days follow and distrain on the goods if they have not been sold *bonâ fide* for value, and without notice in the meantime, and a penalty for such an act may be recovered of double the value of the goods.

Manner of
making a
distress.

The manner of making a distress is as follows:—The landlord either personally or by his bailiff (who need not necessarily be authorized by writing), enters and makes a seizure (any time between sunrise and sunset), by announcing that he there and then distrains.

(a) *Harris v. Shipway*, and *Ever v. Lady Clifton*, Bul. N. P. 182.

(b) *Semayne's Case*, 1 S. L. C. 114; 5 Coke, 91.

(c) See hereon notes to *Semayne's Case*, 1 S. L. C. 122.

(d) 11 Geo. 2, c. 19, ss. 1, 2.

He then makes an inventory of the furniture and goods, and leaves the same, with a written notice of the amount of rent due and of the things distrained, on the premises; after five days from making the distress the chattels are appraised by two sworn appraisers and then sold, and any balance beyond the rent and expenses is afterwards paid to the owner.

A landlord can, if his title still continues, and the tenant is still in possession, distrain for rent after the expiration of his lease (e). An executor or administrator of any lessor may distrain for rent as his testator or intestate might have done, but such distress must be within six calendar months after the determination of the term or lease (f).

A landlord may distrain after expiration of lease; and an executor or administrator may distrain.

The well-known case called "*The Six Carpenters' Case*" (g) decides the point that, where an authority or power is given to a person by the law, and such authority or power is abused by such person, he becomes a trespasser *ab initio*, and a distress being such an authority or power, it followed from the above decision that if there was any irregularity in making the distress, the distrainer was from the moment of distraining a trespasser. This hardship has been remedied by statute (h), which provides that if any rent is justly due, in the case of irregularity the distrainer is *not* to be a trespasser *ab initio*. But if a landlord is not merely guilty of some irregularity, but distrains in an unauthorized way, he is then a trespasser from the commencement; and if he makes an excessive distress an action may be brought against him for so doing. If the tenant tenders (i) the amount of the rent this will make the distress tortious (and although a warrant has been

The *Six Carpenters' Case*.

The effect of this case as to a distress now altered by 11 Geo. 2, c. 19, s. 19.

Tender of rent makes a distress tortious.

(e) 8 Anne, c. 14, s. 6.

(f) 3 & 4 Wm. 4. c. 42, ss. 37, 38.

(g) 1 S. L. C. 143; 8 Coke, 146 a.

(h) 11 Geo. 2, c. 19, s. 19.

(i) See as to a tender, *post*, ch. viii. pp. 204-207.

delivered to a broker, before the distress is put in, a tender without expenses is good); if a tender is made after seizure, but before the impounding of the distress, it makes the detainer and not the original taking wrongful.

Replevin.

The usual proceeding on a wrongful distress is by replevin, the first step in which proceeding is to enter into a replevin bond before the registrar of the district county court with two sureties; and on this being entered into the goods are re-delivered to the owner, who subsequently has to commence an action to try the validity of the distress, and if it goes against him he has to return the goods to the distrainer (*k*).

Other remedies
of a landlord
besides distress.

Besides his remedy to recover rent by the summary process of distress, the landlord has another remedy, viz., by simply bringing an action to recover it, and besides this he may also proceed to eject his tenant.

Action of
ejectment at
common law,
and under
15 & 16 Vict.
c. 76, s. 210.

At common law, before commencing an action for ejectment for non-payment of rent, it was necessary to make a demand for the rent at sunset on the last day limited for payment of the rent; this demand, which was essential, being a great inconvenience, it was provided by the Common Law Procedure Act, 1852 (*l*), that if half a year's rent is in arrear and there is no sufficient distress to be found upon the premises, the landlord may bring ejectment without the necessity of making any previous demand. If half a year's rent is not due or there is a sufficient distress on the premises, it will be observed that this provision is inapplicable, and if ejectment is resorted to it must be as at the common law, quite irrespective of the statute, with the formality of a demand.

Amount of
rent landlord
entitled to
sue and
distrain for.

A landlord may sue for and recover against the land six years' rent, and if the demise be under seal, though he has no claim against the land beyond the six years,

(*k*) See hereon Indermaur's Manual of Practice, 38, note (*d*).
(*l*) 15 & 16 Vict. c. 76, s. 210.

yet he has a right of action against the person for the full period of twenty years (*m*). A landlord may distrain for six years' rent, and if he does so before the goods are taken in execution for a debt, he has a right to the full six years' rent out of the goods notwithstanding the execution; and in the case of the goods on the demised premises being taken in execution before he has distrained, he has even then a right to be paid one year's rent (if so much is due) before the goods are removed under the execution, and the sheriff is empowered to levy out of the goods and pay the execution creditor not only the amount of the execution but also such one year's rent which he has had to pay the landlord (*n*). The landlord has no right as against an execution creditor to more than the one year's rent, although more may be due to him, if the execution has been levied before he has made any distress for his rent (*o*). Has a right against an execution creditor for one year's rent.

In the case of bankruptcy also a landlord has an advantage over other creditors, to the extent of one year's rent, it being provided by the Bankruptcy Act, 1869 (*p*), that "the landlord or other person to whom any rent is due from the bankrupt may at any time, either before or after the commencement of the bankruptcy, distrain upon the goods or effects of the bankrupt for the rent due to him from the bankrupt, with this limitation, that if such distress be levied after the commencement of the bankruptcy, it shall be available only for one year's rent accrued due prior to the date of the order of adjudication; but the landlord, or other person to whom the rent may be due from the bankrupt, may prove under the bankruptcy for the overplus due for which the distress may not have been available" (*q*). Also in the case of bankruptcy.

(*m*) 3 & 4 Wm. 4. c. 27, s. 42; 3 & 4 Wm. 4, c. 42, s. 3. See Greenwood's Real Property Statutes, 91-95. Sect. 1 of 37 & 38 Vict. c. 57, makes no difference in what is above stated, for it does not apply as between landlord and tenant *as such*. Ibid. 9.

(*n*) 8 Anne c. 14, s. 1.

(*o*) Ibid.

(*p*) 32 & 33 Vict. c. 71.

(*q*) Sect. 34.

On bankruptcy trustee may disclaim lease as onerous property.

If, during the continuance of a lease, the lessee becomes bankrupt, the position of his landlord for the remainder of the term is that the trustee in bankruptcy may take to the lease and hold it or deal with it generally for the benefit of the creditors, or may disclaim it, as being onerous property, in which case the lease will be deemed determined from the date of the order of adjudication, and the landlord may then prove against the bankrupt's estate for any injury or loss caused him by such disclaimer (*r*). The landlord may make an application in writing to the trustee to decide whether or not he will disclaim; and if the trustee does not then disclaim within twenty-eight days, or such further time as may be allowed by the Bankruptcy Court having jurisdiction, he cannot afterwards do so (*s*).

Apportionment Act, 1870.

Tenant is liable to be ejected on breach of covenants.

But relief given in two cases.

If a tenant is evicted, or his term is surrendered by operation of law during the continuance of a current year or half year or quarter, an apportionment of the rent is now, under the Apportionment Act, 1870 (*t*), made in all cases. On the breach by a tenant of the covenants contained in his lease he is liable to be ejected by his landlord; but in the two cases of covenants to pay rent and to insure, the Court has power to relieve on the payment of the rent and costs in the one case (*u*); and in the other case, if shewn that the omission to insure arose through accident or mistake, or otherwise than from fraud or gross neglect, that no loss or damage by fire has happened, that there is at the time of the application an insurance on foot in conformity with the terms of the covenant, and also provided relief has not previously been given or a previous breach waived by the landlord out of court. A

(*r*) 32 & 33 Vict. c. 71, s. 23.

(*s*) Ibid. s. 24. These provisions as to disclaimer do not only apply to the relation of landlord and tenant, but to all cases of onerous property.

(*t*) 33 & 34 Vict. c. 35.

(*u*) This was always so in equity, and as to the Courts of law was so provided by 15 & 16 Vict. c. 76, s. 211.

memorandum of the fact of the relief has to be indorsed on the lease (*w*).

The relation of landlord and tenant creates an implied consent by the landlord that the tenant may appropriate such part of his rent as shall be necessary to indemnify him against prior charges, and that the money so appropriated shall be considered as paid on account of the rent; so that if a tenant discharges some burden upon the premises prior to his own interest therein, it is considered as an actual *payment* of so much rent, and need not be set up as a set-off, but as an actual payment (*y*).

Tenant has a right to satisfy any burden on the land out of his rent.

It has been decided that if a person agrees to take a furnished house, as it is naturally intended for immediate occupation, there is an implied condition that it is fit for habitation, so that if by reason of defective drains or otherwise it is not, the tenant is justified in repudiating the agreement, and is not liable upon it (*z*).

Implied condition on taking a furnished house.

(*w*) This power was given to equity by 22 & 23 Vict. c. 35, ss. 4, 5, 6, and to law by 23 & 24 Vict. c. 126, s. 2.

(*y*) 1 S. L. C. 177, 178.

(*z*) *Wilson v. Finch Hatton*, L. R. 2 Ex. D. 336.

CHAPTER IV.

OF CONTRACTS AS TO GOODS, AND HEREIN OF BAILMENTS,
INCLUDING CARRIERS AND INNKEEPERS (a).

What is a
sale of goods.

Whether the
property in
goods has
passed is
frequently a
question of
intention.

THE most usual, and therefore most important, kind of contracts as to goods are for their sale, which has been defined as the transferring of property from one man to another, in consideration of some price or recompense in value (b). The majority of contracts for the sale of goods are undoubtedly simple and plain in their nature, but in very many such contracts intricate and difficult points arise as to the passing of property in the goods and the relative right of the vendor and vendee in the subject-matter of the contract; and whether the property in goods has passed under a contract is frequently a question of intention, to be gathered from the expressions made use of in the contract and the surrounding circumstances (c). Of course, if goods, on being sold, are actually delivered over to the purchaser, there can be no doubt whatever of the property at once passing to him; but in many cases the goods may remain in the possession of the vendor whilst the property in them has passed to and is vested in the purchaser, so that any loss happening to them would have to be borne by the latter; for, as is stated by Mr. Broom, in his Commentaries (d), "It is clear that, by the law of England, the property in a specific chattel may pass without delivery. It will so

(a) As to the title to goods, see *post*, Part ii. 'Torts,' ch. ii. pp. 273-277.
 (b) Brown's Law Dict. 319.
 (c) Broom's Coms. 391.
 (d) *Ibid.* 394.

pass when, at the time of the bargain, everything is already done which, according to the intention of the parties, was necessary to transfer the property; the reason of this being, that the very appropriation of the chattel is equivalent to delivery by the vendor; and the assent of the vendee to take the specific chattel and to pay the price is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee."

On this point it has been well stated that, at common law, in either of the following cases, there is a good bargain and sale of a thing to alter the property thereof:—

When the property in goods passed at common law as stated in Sheppard's Touchstone.

1. Where the thing is to be delivered to the vendee at a day certain, and a day is agreed for payment of the money.

2. Where all or any part of the money is paid, or a payment is made by way of earnest; or

3. Where, without any other circumstance, the vendee takes the thing into his possession (e).

In the first case above mentioned, now, as we shall presently see, writing is required, in many instances; also such first case is not at the present day strictly correct, for it is not necessary now for there to be an actual day fixed, the property may pass without this (f). The rule on this point now is well expressed by Parke, J. (g): "Where by the contract itself the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel and to pay the stipulated price, the parties are then in the

Writing however now sometimes necessary. Variation of first rule stated in Sheppard's Touchstone.

(e) 1 Shepp. Touch. 224; see also Benjamin's Sale of Personal Property, 231.

(f) Benjamin's Sale of Personal Property, 232.

(g) In *Dixon v. Yates*, 5 A. & E. 313, 340.

same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel and to pay the price is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee."

The giving of earnest does not now alter the property.

Neither is the second case mentioned in Sheppard's Touchstone correct law now, so far as it relates to payment of earnest, for modern cases go to shew that the giving of earnest does not necessarily pass the property in the goods, but simply affords evidence of the conclusion of the bargain, which is a very different thing to the property actually passing (*h*).

When the property in goods does not pass.

But there are many cases in which the transaction may be simply inchoate and incomplete, and not pass any property in the goods, as where the contract shews that there is no intention to pass the property until something has been done by the seller. Thus, in one case, where, on the contract for the sale of goods, it was, according to the usage of trade, the duty of the seller to count them out, and before he did so the goods were destroyed by fire, it was held that the loss fell on the vendor (*i*). In another case, turpentine was bought at an auction, which, according to the conditions of sale, was to be weighed, and before it was entirely weighed it was destroyed by fire; the Court held that the property had not passed in that portion of the goods which had not been weighed (*k*). And—to take one more case—where the defendant had contracted for the purchase of the trunks of certain trees, and the custom of the trade was that he should measure and mark the portions he wanted, and that the vendor should then

(*h*) See *Ball v. Owen*, 5 T. R. 499; *Hinde v. Whitehouse*, 7 East, 558; Benjamin's Sale of Personal Property, 260-62.

(*i*) *Zagury v. Furnell*, 2 Camp. 240.

(*k*) *Rugg v. Minett*, 11 East, 210.

cut off the rejected parts, it was held that no property had passed in the goods until such rejected parts had been actually severed (*l*).

Where goods, part of an entire bulk, are sold, no property passes in them until separated and set apart from the bulk and absolutely appropriated to the purchaser (*m*). It is sometimes the vendor, and sometimes the purchaser, who has the right of selecting the particular goods from the entire bulk; and the rule is, that "the party who by the agreement is to do the first act which, from its nature, cannot be done until the election is determined, has authority to make the choice in order that he may be able to do that first act; and, when once he has done that act, the election has been irrevocably determined, but till then he may change his mind" (*n*). An instance of when the right of appropriation will be in the purchaser may be found in the case of the sale of a certain number of bricks out of a stack of bricks, and it being provided that the purchaser shall send his cart to take them away. Here the first act has to be done by the purchaser, and he, therefore, has the right of appropriation. He may choose which of them he likes, but as soon as he has once put them in his cart to be fetched away the appropriation is complete and the property has passed. But if in such a case the contract was that the vendor should load them on the purchaser's cart, here the right of appropriation would be in the vendor, for the first act is to be done by him; and in all cases of appropriation by the vendor such appropriation must be assented to by the vendee before the property will pass (*o*). In the case also of a contract to make any article (though an action would of course lie for the breach of the contract), the property therein will not pass until there

When property passes in goods part of an entire bulk.

When the property passes in goods to be made.

(*l*) *Acraman v. Morris*, 8 C. B. 449.

(*m*) See *Dixon v. Yates*, 5 B. & Ad. 313.

(*n*) Benjamin's Sale of Personal Property, 204.

(*o*) *Ibid*.

has been a subsequent appropriation thereof made by the vendor and assented thereto by the purchaser. And so also a grant of goods not in existence, or not belonging either actually or potentially to the grantor at the time, is of no effect, unless the grant is afterwards in some way ratified by him after acquiring a property in them (*p*). The mere fact of the price not being mentioned in the contract does not prevent the property passing, for it may be either a price to be thereafter agreed on, or what the things are reasonably worth (*q*).

General answer
to question of
when property
in goods passes

Generally, upon this subject, with regard to the question of when does the property in goods pass, it will be best to found the answer upon what has been previously stated from Sheppard's Touchstone, as varied as also stated (*r*), and say that *the property will pass where there is a valid and complete contract, or the price has been fully or partly paid ; provided that in each of these cases the goods are in existence and no act remains to be done by the vendor, or the vendee has acquired possession of the goods.*

Contracts as to goods are in many cases required by statute to be by writing.

4th section of
Statute of
Frauds as
applying to
contracts for
sale of goods.

By the 4th section of the Statute of Frauds (*s*) it is provided that no action shall be brought whereby to charge any defendant upon (*inter alia*) any contract not to be performed within one year from the making thereof. This section has already been discussed (*t*), and with regard to this portion of it, it is sufficient here to say that, applying to all contracts not to be performed within a year, it includes contracts as to goods.

(*p*) *Robinson v. Macdonnell*, 5 M. & S. 228.

(*q*) *Acebal v. Levy*, 10 Bing. 376; *Hoadly v. McLaine*, 10 Bing. 482; *Joyce v. Swann*, 17 C. B., N.S. 84. See hereon also Broom's Coms. 391-401, and cases there referred to.

(*r*) *Ante*, pp. 71, 72.

(*s*) 29 Car. 2, c. 3.

(*t*) *Ante*, pp. 39-47..

By the 17th section of the Statute of Frauds it is enacted that, "no contract for the sale of any goods wares, and merchandises (*u*), for the price of £10 sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

17th section
of Statute
of Frauds.

On the construction of this section it was decided by several cases (*x*) that it did not apply to contracts to make or deliver goods not in existence at the time of the contract, *and therefore not capable of delivery or part acceptance at the time of the bargain*, and in consequence, it is provided by Lord Tentenden's Act (*y*), that such section "shall extent to contracts for the sale of goods of the value of £10 sterling and upwards, notwithstanding the goods may be intended to be delivered at some future-time, or may not at the time of the contract be actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof or rendering the same fit for delivery." This enactment must be read and construed as if incorporated with the Statute of Frauds (*z*).

Construction
put on this
section.

Provision in
Lord Tenter-
den's Act in
consequence.

The memorandum required by the 17th section of the Statute of Frauds has been before touched on in treating of the statute generally (*a*), but the student will note that writing is not an absolute essential, as there may be instead either part payment, earnest, or acceptance and receipt.

Writing not
absolutely
necessary
under 17th
section of
Statute
of Frauds.

Earnest is a matter quite distinct from part payment,

Distinction
between
earnest and
part payment.

(*u*) A horse or other animal would be within the expression "goods, wares, or merchandise."

(*x*) See them cited in Benjamin's Sale of Personal Property, 74.

(*y*) 9 Geo. 4, c. 14, s. 7.

(*z*) *Scott v. Eastern Counties Ry. Co.*, 12 M. & W. 33; *Harman v. Reeves*, 25 L. J. (C. P.) 257.

(*a*) *Ante*, pp. 45, 46.

being some gift or token given by a buyer to a seller not on account of but quite irrespective of the price; part payment is simply an actual payment of money on account of the price. The giving of earnest is not a course adopted often now, though part payment is frequently (b).

What will
amount to
earnest or
part payment

On the point of part payment or earnest, also, it may be noticed that an actual payment is necessary, so that what is called in the north of England "striking off" a bargain, *i.e.*, drawing the edge of a shilling over the hand of the vendor and not paying him the money is not sufficient (c); but delivery of a bill of exchange or promissory note is, because it amounts to payment until dishonoured (d).

As to accept-
ance and
receipt under
17th section
of Statute
of Frauds.

The acceptance and receipt require a slightly more detailed explanation.

Distinction
between the
acceptance and
receipt as ex-
plained by
Mr. Justice
Blackburn.

The words of the statute are that the buyer shall "accept and actually receive" part of the goods sold, and the receipt of the goods implies a delivery, which may be either actual or constructive, and the constructive receipt may be evidenced in many different ways, *e.g.*, the delivery of the key of a warehouse (e). The first point for the student to notice upon this acceptance and receipt is that they are two distinct things, which has been well explained by Mr. Justice Blackburn thus: "It seems that this provision is not complied with unless the two things concur, the buyer must accept, and he must actually receive part of the goods, and the contract will not be good unless he does both. And this is to be borne in mind, for as there may be an actual receipt without any acceptance so there may be an acceptance without any receipt. In the absence of

(b) See Benjamin's Sale of Personal Property, 143.

(c) *Blenkinsop v. Clayton*, 7 Taunt. 597.

(d) *Chamberlyn v. Delarive*, 2 Wils. 253; see Benjamin's Sale of Personal Property, 146, 598.

(e) Broom's Coms. 406, 407.

authority, and judging merely from the ordinary meaning of language, one would say that an acceptance of part of the goods is an assent by the buyer meant to be final, that this part of the goods is to be taken by him as his property under the contract, and so far satisfying the contract. So long as the buyer can without self-contradiction declare that the goods are not to be taken in fulfilment of the contract he has not accepted them. And it is immaterial whether his refusal to take the goods be reasonable or not. If he refuses the goods assigning grounds false or frivolous, or assigning no reason at all, it is still clear that he does not accept the goods, and the question is not whether he ought to accept, but whether he has accepted, them. The question of acceptance or not is a question as to what was the intention of the buyer as signified by his outward acts.

“The receipt of part of the goods is the taking possession of them, when the seller gives to the buyer the actual control of the goods, and the buyer accepts such control, he has actually received them. Such a receipt is often evidence of an acceptance, but it is not the same thing; indeed the receipt by the buyer may be, and often is, for the express purpose of seeing whether he will accept or not. If goods of a particular description are ordered to be sent by a carrier, the buyer must in every case receive the package to see whether it answers his orders or not; it may even be reasonable to try part of the goods by using them; but though this is a very actual receipt it is no acceptance so long as the buyer can consistently object to the goods as not answering his order. It follows from this that a receipt of goods by a carrier, or on board ship, though a sufficient delivery to a purchaser, is *not* an acceptance by him so as to bind the contract, for the carrier if he be an agent to receive is clearly not one to accept the goods” (*f*).

(*f*) Blackburn on Sales, 22, 23, quoted in Benjamin's Sale of Personal Property, 110, 111.

Receipt may in some cases amount to an acceptance as well.

It is a question of fact more than of law.

Summary on this point.

What must be done by a vendor or vendee before suing on a contract for sale of goods.

In many cases a mere receipt of goods by the vendee may, however, amount to an acceptance of them by him, but in as many other cases not, *e.g.*, if goods are sold and sent to a vendee on approval, there the vendee, though receiving the goods, cannot be said to have accepted them unless he approve of them and elects to keep them. Numerous decisions on this point are stated by Mr. Broom in his Commentaries on the Common Law (*g*), and also in Mr. Benjamin's treatise on the Law of Sale of Personal Property (*h*), and they certainly do not all agree with each other, perhaps because, as suggested in the former work, the points of acceptance and receipt seem to be questions more of fact than law, and the difficulty lies in estimating the weight of proof adduced. To endeavour to sum up an answer to the question of what will amount to a sufficient "acceptance and actual receipt" within the statute we shall be tolerably correct in stating, as a summary of all that has been previously given, that *there must be a delivery actual or constructive, and the vendee must by his acts either prior to or contemporaneously with the receipt have signified his acceptance in some way, but that what is or is not an acceptance is a question principally of fact depending on the different circumstances of each particular case, but that there can at any rate never be a sufficient acceptance until the purchaser has had an opportunity of judging of the articles.*

In an ordinary contract for the sale of goods if nothing is agreed to the contrary either expressly or impliedly, the vendor before he can bring an action for their price must have delivered the goods, and on the other hand, the vendee before he can sue for the non-delivery of the goods must have paid or tendered the price (*i*), for the vendor has a lien upon them for that

(*g*) Pages 406-411.

(*h*) Pages 111-142.

(*i*) Chitty on Contracts, 405.

price (*k*). A lien may be defined as a qualified right of property which a person has in a thing arising from such person having a claim upon its owner (*l*); and it may be either *general*, *e.g.*, the right of a solicitor to retain his client's papers for a general balance due to him, or *particular*, *e.g.*, the ordinary right of a vendor to retain particular goods until payment of their price; the law leans in favour of a particular, but against a general lien, which will only be allowed when there is a custom to that effect. The lien in both cases can only be commensurate with the interest of the person through whom it arises, and it may be lost by the vendor taking a security for payment, *e.g.*, a bill of exchange or promissory note; but if such instrument is dishonoured the right of lien will revive if the instrument is still in the hands of the vendor, though not if outstanding in a third person's hands (*m*). Where, too, goods are sold on credit, the vendor has no right of lien, for that would be contrary to the contract; but, notwithstanding this, it has been decided that if before delivery of the goods the vendee becomes insolvent, the vendor may refuse to deliver, and may withhold them until payment (*n*). And notwithstanding that if goods have been sold on credit a vendor has no right of lien, yet if the vendee permits them to remain in the vendor's possession till the period of credit has expired the right of lien revives and attaches (*o*).

Definition
of a lien.

How lien lost.

No lien
generally
where goods
sold on credit.

A lien can of course only exist before the goods have been delivered to the purchaser, and the mere marking of goods remaining in the vendor's possession by the purchaser, or putting his name upon them, or other

A lien can
only exist be-
fore delivery.

(*k*) Chitty on Contracts, 391.

(*l*) Brown's Law Dict. 218.

(*m*) Chitty on Contracts, 392; Byles on Bills, 391, 392; *Gunn v. Bolchow*, L. R. 10 Ch. App. 491.

(*n*) *Ex parte Chalmers*, L. R. 8 Ch. App. 289.

(*o*) *Bunnay v. Poynts*, 4 B. & A. 568; *Valpy v. Oakley*, 20 L. J. (Q.B.) 380.

like acts, will not constitute a delivery sufficient to deprive the vendor of his right of lien (*p*).

A lien is a passive right. Except in the case of an innkeeper.

A lien is a right of a passive nature, and does not confer on the vendor any power to sell the goods (*q*). In the one case, however, of an innkeeper it has been provided by the Innkeepers Act, 1878 (*r*) that if a person shall become indebted to him and shall deposit or leave any personal effects with him or in his inn or adjacent premises for the space of six weeks, the innkeeper, after having advertised a month previously in one London newspaper and one country newspaper circulating in the district a notice describing the goods, and giving (if known) the name of the owner or person who deposited the goods, and of his intention to sell, may duly sell the same by public auction. Any surplus after paying the debts and expenses is to be paid to the person who left or deposited such goods.

Definition of stoppage in transitu.

The doctrine comes from equity.

Lickbarrow v. Mason.

How the right may be lost.

Closely akin to the right of lien is a further right of the vendor of goods, viz., stoppage *in transitu*, which is the prevention of wrong by a mere personal act, being the right of the vendor to stop the goods after they have left his possession, but are *in course of transit* to the vendee, on hearing of the vendee's bankruptcy or insolvency. The doctrine of *stoppage in transitu* seems to be borrowed from equity (*s*), and the recognised leading case on the subject is that of *Lickbarrow v. Mason* (*t*), which establishes clearly the doctrine itself, and in addition lays down the rule that it may be lost by the bill of lading for the goods being indorsed (*u*) by the

(*p*) *Dixon v. Yates*, 5 B. & Ad. 313; *Marvin v. Wallace*, 25 L. J. (Q.B.) 369.

(*q*) Per Alderson, B., *White v. Spettigue*, 13 M. & W. 608.

(*r*) 41 & 42 Vict. c. 38.

(*s*) *Wiseman v. Vanderput*, 2 Vern. 203, seems to be the first case in which it was acted upon.

(*t*) 1 S. L. C. 753; 2 T. R. 63.

(*u*) This means by the goods being sold for value; the bill of lading is the document of title to them, and is negotiable.

vendee to a *bonâ fide* indorsee for valuable consideration without notice of the bankruptcy or insolvency. The right, as its name imports, only exists whilst the goods are in transit, and directly they come into the actual or constructive possession of the vendee the right is gone. It is not always easy to decide whether goods are "*in transitu*" or not, for there may be cases of constructive possession of the vendee not always very apparent; the rule to be collected from all the cases has been well stated to be "that they are *in transitu* so long as they are in the hands of the carrier as such, whether he was or was not appointed by the consignee, and also so long as they remain in any place of deposit connected with their transmission. But that if, after their arrival at their place of destination, they be warehoused by the carrier whose store the vendee uses as his own, or even if they be warehoused by the vendor himself and rent be paid to him for them, that puts an end to the right to stop *in transitu*" (x). The mere giving of a delivery order to the purchaser does not operate as a constructive delivery of the goods so as to prevent the right of stoppage *in transitu* (y), and if the vendor only delivers part of the goods, intending to retain the remainder, his right of stoppage will still exist in respect of the remainder unless the delivery of the part is in the name of the whole, in just the same way as the right of lien would also exist on any part of the goods retained in the vendor's possession (z). The vendee may shorten the period of transit by taking them from the possession of the carrier before the ordinary time, and if the goods ought to be given up by the carrier he cannot prolong the vendor's right of stoppage by improperly refusing to give them up (a). When the *transitus* is once ended no subsequent transit can revive the vendor's right.

When the goods can be said to be "*in transitu*."

The vendee may shorten the period of transit.

(x) 1 S. L. C. 816.

(y) *M'Ewan v. Smith*, 2 H. of L. Cas. 209.

(z) *Ex parte Chalmers*, L. R. 8 Ch. 289.

(a) 1 S. L. C. 821; *Bird v. Brown*, 4 Ex. 786.

How the
stoppage *in*
transitu may
be effected.

For the vendor to exercise this right, it is not essential that he should actually seize the goods, but the stoppage may be effected by giving a notice to the carrier or other forwarding agent. If a servant of the carrier is conveying the goods, notice may be given to the servant or the principal; but if to the principal, it must be given in time to enable him to inform the servant before he delivers them (*b*).

Wentworth v.
Outhwaite.

In the case of *Wentworth v. Outhwaite* (*c*), in the judgment of the Court, it is stated as follows: "What the effect of stoppage *in transitu* is, whether entirely to rescind the contract, or only to replace the vendor in the same position as if he had not parted with the possession, and entitle him to hold the goods until the price is paid, is a point not yet finally decided;" but the majority of the Court there were of opinion that it is not a rescission of the contract, but at the most a re-vesting of the possession in the vendor, and there seems but little doubt that this is the correct law on the subject (*d*).

Better opinion
that stoppage
in transitu
does not
rescind the
contract.

Assignee of
goods by in-
dorsement of
bill of lading
may sue in
his own name.

As before stated, this right may be lost by the *bonâ fide* indorsement of the bill of lading without notice and for value. And now, by the 40 & 41 Vict. c. 39, s. 5, this is extended to the indorsement or transfer of any document of title (*e*). Formerly however, any indorsee of a bill of lading would not have been able to sue in his own name, but this was altered by 18 & 19 Vict. c. 111; and, in addition to this statute, it may also be noticed that now, under the provisions contained in the Judicature Act, 1873 (*f*), any absolute assignee of a *chose in action*, after giving notice of the

(*b*) *Whitehead v. Anderson*, 9 M. & W. 518; *Ex parte Watson, In re Love*, 5 Ch. Div. 35.

(*c*) 10 M. & W. 451.

(*d*) See 1 S. L. C. 813.

(*e*) As to what is a "document of title," see *Gunn v. Bolckow*, L. R. 10 Ch. 491.

(*f*) 36 & 37 Vict. c. 66, s. 25 (6).

assignment to the debtor, trustee, or other person from whom the assignor would have been entitled to claim, may sue in his own name.

The rights of a vendor having sold goods are, if the property in them has not passed to the vendee (*g*), to sue him for damages for his breach of contract; and if the property has passed, to sue him for their price; and in this latter case, although the vendor has retained the goods in respect of his lien, the action will equally be "for the price of goods sold" in just the same way as if they had been delivered (*h*). If the vendor does not duly deliver the goods, the vendee's right will be to bring an action in respect of the breach of contract; and by the Mercantile Law Amendment Act 1856 (*i*), it is provided that in all actions for breach of contract to deliver specific goods for a price in money, on application of the plaintiff, and by leave of the presiding judge, the jury, if they find for the plaintiff, shall also find (1) what are the goods in question, (2) what (if any) is the sum the plaintiff would have been liable to pay for delivery thereof, (3) what damage the plaintiff will have sustained if the goods should be delivered under execution as thereafter mentioned, and (4) what damages if not so delivered; and thereupon, on judgment for the plaintiff, execution may be ordered to issue for the delivery of the goods (on payment of such sum (if any) as shall have been found to be payable by the plaintiff as aforesaid), without giving the defendant the option of retaining the same upon paying the damages assessed.

Rights of a vendor for breach by vendee.

Mercantile Law Amendment Act, 1856.

A warranty is sometimes given by a vendor of goods on their sale. A warranty may be defined as some undertaking expressly given or arising by implication

Definition of a warranty.

(*g*) As to which, see *ante*, pp. 72, 74.

(*h*) See Judicature Act, 1875, 1st Sched., Appendix A., part 2, sec. 2.

(*i*) 19 & 20 Vict. c. 97, s. 2. See this also noticed, *post*, part iii. ch. i. "On Damages," pp. 360, 361.

on the sale of goods; and an untrue warranty is not the same as a misrepresentation, for that precedes and induces the contract, and gives the person to whom it is made the right to repudiate it, whilst a warranty is made contemporaneously with the contract, and its breach does not vitiate it, but gives the right to the remedies hereinafter detailed (*k*). A warranty, too, should be carefully distinguished from a guarantee (*l*).

Warranty
subsequent to
sale bad.

What will
amount to
a warranty.

Chandelor v.
Lopus.

Implied
warranty.

Warranty
of title.

On an express warranty, it must be noted that if made subsequently to the contract, it will be void and of no effect for want of consideration (*m*); and as to what will, and what will not, amount to a warranty, the rule at the present day has been well stated to be that "every affirmation at the time of sale of personal chattels is a warranty, provided it appears to have been so intended" (*n*). It would appear, upon this rule, that the well-known case of *Chandelor v. Lopus* (*o*) would now be decided differently, for there, on the sale of a stone, it was affirmed that it was a Bezoar stone, and yet it was held no action lay. However, if, on any contract for sale, the words used are merely the ordinary puffing of the articles, no action will lie; and though the above rule is plain, yet the most that can be said on it is that it must be a question of intention in each particular case. An implied warranty may sometimes arise generally and universally, *e.g.*, on the sale of certain specified goods, there is an implied warranty that they exist and are capable of transfer; or such a warranty may arise sometimes by the mere custom or usage of some particular trade or business.

As to whether there is on the sale of goods any implied warranty of title, the rule has usually been stated

(*k*) On this distinction see notes to *Chandelor v. Lopus*, 1 S. L. C. 184, 185, and also the case of *Pasley v. Freeman*, 2 S. L. C. 66.

(*l*) As to which, see *ante*, p. 40.

(*m*) *Roscorla v. Thomas*, 3 Q. B. 234.

(*n*) Per Buller, J., in *Pasley v. Freeman*, 3 T. R. 37.

(*o*) 1 S. L. C. 183; 2 Coke, 2.

to be that there is not (*p*); but this is an old rule, to which various exceptions have been introduced, and Mr. Benjamin, in his treatise on the law of Sale of Personal Property (*q*) (to which the student is referred for an examination of the cases on the point) says: "The rule at present would seem to be stated more in accordance with the recent decisions, if put in terms like the following:—A sale of personal chattels implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title, unless it be shewn by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattels sold." This is, it is submitted, the most correct way of answering the question, Is a warranty of title implied on the sale of goods?

Rule as stated
in Benjamin's
Sale of
Personal
Property.

There is also, generally, no implied warranty of the quality of goods, the maxim of *caveat emptor* (let the buyer beware), applying: but where they are expressly sold for a particular purpose, there is an implied warranty that they are reasonably fit for that purpose, and the vendor is liable even although the unfitness proceed from latent defects not discoverable by ordinary care (*r*). Also, on the sale of provisions, there is an implied warranty that they are wholesome; and on the sale of goods by sample there is an implied warranty that they will accord to the sample, or in other words that the sample is fairly taken from the bulk, but nothing further. And if any article is sold with a trade-mark, label, or ticket, &c., thereon, or any statement thereon of the weight, quantity, or quality thereof, a warranty is implied that the trade-mark, label, or ticket, &c., is genuine and true, and that any such statement is not in any material respect false, unless the contrary is expressed in writing, signed by or on behalf of

No warranty
as to quality
of goods
generally, the
maxim being
caveat emptor.

Warranty
from trade-
mark, &c.

(*p*) *Morley v. Attenborough*, 3 Ex. 500; Chitty on Contracts, 407, 408.

(*q*) Page 523.

(*r*) *Randall v. Newson*, 2 Q. B. Div. 102; 46 L. J. Q. B. 259.

the vendor, and delivered to, and accepted by, the vendee (s).

A warranty does not extend to apparent defects.

If a fact is known to a purchaser at the time of the sale, or might have been so known to him (take, for instance, the familiar example of a horse being warranted sound, and wanting an ear or a tail), a warranty will not protect the purchaser; and where an article is sold expressly with all faults, the only case of defect for which the purchaser can sue the vendor is where the vendor has used artifice to prevent the purchaser discovering it. It would not be sufficient to merely shew that the vendor knew of the defect (t).

Remedies for breach of warranty.

In all cases of breach of warranty there are two remedies open to the purchaser, viz., (1) he may sue for damages for the breach of the warranty, and (2) in an action brought against him for the price, he may set off the breach in its reduction. In the case of an executory contract, i.e., where goods are to be made, there is an additional remedy open to the purchaser; for, provided he has not precluded himself by doing more than examining or trying the article, he is entitled to return it. So, also, he may return goods sold according to sample on finding that there is a breach of the warranty implied on such a sale (u).

There may be a warranty for a future event.

There seems to be no doubt (notwithstanding Blackstone (x) states to the contrary) but that there may be a warranty for a future event (y).

Bill of sale.

A very frequent and common mode of dealing with goods is by bill of sale, which is a deed of transfer of personal chattels. The Act now governing the subject of the form to be observed with regard to these

(s) 25 & 26 Vict. c. 88, ss. 19, 20; Chitty on Contracts, 407, 416. As to trade-marks generally, see *post*, pp. 160–162.

(t) Chitty on Contracts, 418.

(u) Chitty on Contracts, 419. As to what warranty is implied see *ante*, p. 85.

(x) 3 Bl. Com. 166.

(y) Chitty on Contracts, 419–422, and the authorities there cited.

instruments is the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), and this Act under the term "bill of sale" includes assignments, transfers, declarations of trust without transfer, and other assurances of personal chattels, also powers of attorney and authorities or licences to take possession of personal chattels as security for any debt; but it does not include assignment for the benefit of creditors, marriage settlements (that is ante-nuptial settlements, or settlements made in pursuance of an ante-nuptial agreement), transfers of goods in the ordinary course of business of any trade or calling, or bills of sale of goods in foreign ports or at sea, bills of lading, delivery orders, or any other documents used in the ordinary course of business, as the proof of the possession or control of goods (z).

It is provided by the above Act that every bill of sale must be attested by a solicitor, and the attestation must state, and the fact must be, that before execution its effect has been explained to the grantor by the attesting witness (a); but it has been recently held that if this is not so the instrument is not void as between the parties themselves but only as against execution creditors and trustees in bankruptcy and liquidation proceedings, and under assignments for benefit of creditors (b).

Attestation of
bills of sale by
a solicitor.

In order to make the bill of sale fully effectual, an affidavit of the time of the bill of sale having been given, of its due execution and attestation, of the residence and description of the person giving it, and of the attesting witness, must be made, and the bill of sale must be registered and the affidavit filed in the Queen's Bench Division of the High Court of Justice within seven clear days after giving it (unless the seven days

Registration
&c.

(z) 41 & 42 Vict. c. 31, s. 4; 1 S. L. C. 17.

(a) Sect. 10.

(b) *Davis v. Goodman*, L. R. 5 C. P. Div. 128, reversing the decision below, reported L. R. 5 C. P. Div. 20.

expires on a Sunday or other day on which the office is closed, when registration is to be good if made on the next following day on which the office is open), otherwise as against (1) trustees in bankruptcy, or liquidation, (2) trustees under an assignment for the benefit of creditors, and (3) execution creditors, it is to be deemed fraudulent and void so far as the property in or right to the possession of any chattels comprised in such bill of sale which at or after the time of filing the petition for bankruptcy or liquidation, or of the execution of such assignment, or of executing process under the execution, and after the expiration of seven days, are in the possession or apparent possession of the person making such bill of sale (c). Registration must be renewed every five years (d). A transfer or assignment of the bill of sale does not need to be registered (e).

To prevent evasion of the Act by the execution of fresh bills of sale within seven days from time to time, it is provided that any such subsequent bill of sale executed within seven days of an unregistered bill of sale for the same debt or any part thereof is to be void unless proved that it was given *bonâ fide* for the purpose of correcting some material error in the prior bill of sale, and not for the purpose of evading the Act (f). Omission to register and re-register within the proper time, or omissions or mis-statements of name, residence, or occupation of any person, may be rectified by any Judge of the High Court on his being satisfied that the omission or mis-statement was accidental or due to inadvertence, on such terms or conditions (if any) as he may think fit (g). Upon evidence of the discharge of the debt for which any bill of sale has been given, a memorandum of satisfaction may be ordered to be written upon any copy of a bill of sale (h).

(c) 41 & 42 Vict. c. 31, s. 8.

(d) Sect. 11.

(e) Sect. 10.

(f) Sect. 9.

(g) Sect. 14.

(h) Sect. 15.

Chattels comprised in a bill of sale duly registered under the Act are not to be deemed to be in the order or disposition of the grantor of the bill of sale within the meaning of the Bankruptcy Act, 1869 (i). The Act only applies to bills of sale registered or renewed since the commencement of the Act (1 Jan. 1878) (k).

Goods are frequently delivered to some person not their absolute owner, and a bailment thus constituted. A bailment has been defined as "a delivery of a thing in trust for some special object or purpose, and upon an undertaking express or implied to conform to the object or purpose of the trust" (l). Different classifications of bailments have been given, but perhaps the best is found in the judgment of Lord Holt, in the leading case of *Coggs v. Bernard* (m), where they are divided as follows:—

Definition of
a bailment.

Division of
bailment by
Lord Holt, in
*Coggs v.
Bernard*.

1. *Depositum*—where goods are delivered to be kept by the depositee without reward for the bailor;

2. *Commodatum*—where goods are lent to some person gratis to be used by him;

3. *Locatio rei*—where goods are lent out to a person for hire;

4. *Vadium*—where goods are pawned or pledged;

5. *Locatio operis faciendi*—where something is to be done to goods, or they are to be carried for reward; and

6. *Mandatum*—where goods are to be carried gratis.

Of the above, let us first deal with those bailments called *depositum* and *mandatum*, they being exactly

Depositum and
mandatum.

(i) Sect. 20.

(k) Sect. 3. As to former bills of sale, see 17 & 18 Vict. c. 36; 29 & 30 Vict. c. 96.

(l) Broom's Coms. 785.

(m) 1 S. L. C. 199; Lord Raymond, 909.

Facts in *Coggs*
v. *Bernard*.

Wilson v.
Brett.

similar to each other in respect that each is the doing of some act by the bailee voluntarily and without reward. Now, in any case of a merely voluntary nature a person cannot be compelled to do the act required, for a simple contract requires a valuable consideration (n), and therefore it is said that a voluntary bailee is not liable for *nonfeasance*, so that though from his not doing what he has contracted to do damage may have arisen to the other party, yet he is not liable (o). But if a bailee enters upon the bailment, as by accepting a deposit of goods, there is sufficient consideration by the entrusting to create a duty in him to perform the matter properly, and if he does not do so he is liable, if he is guilty of such default as to amount to gross negligence, and the before-mentioned case of *Coggs* v. *Bernard* is a direct decision on this point. The facts in that case were that the defendant had promised the plaintiff to take up several hogsheads of brandy then in a certain cellar, and lay them down again in a certain other cellar safely and securely; and by the default of the defendant one of the casks was staved, and a quantity of brandy spilt. It was decided that the plaintiff was entitled to recover, notwithstanding the defendant was not to be paid, but that a voluntary bailee was only liable for gross negligence. This, then, is the general principle of law governing the liability of voluntary bailees, but it has been in some slight degree altered, it being now decided that if a voluntary bailee is in such a situation as to imply skill in what he undertakes to do, an omission to use that skill is imputable to him as gross negligence (p). Thus in the case of *Wilson* v. *Brett* (cited below), it was held that a person who rode a horse for the purpose of exhibiting and offering him for sale, though he was to receive no reward for doing so, was yet bound to use such skill as he possessed, and that he being proved to be conversant with

(n) *Ante*, pp. 27, 31.

(o) *Elsce* v. *Gatward*, 5 T. R. 143.

(p) *Wilson* v. *Brett*, 11 M. & W. 113.

and skilled in horses, was equally liable with a borrower for an injury done to the horse.

In the above cases of *mandatum* and *depositum* the *Commodatum*. reason of the bailee being only liable for his gross neglect is the fact of the bailment being altogether for the bailor's benefit; but in the case of the bailment called *commodatum*, as the whole benefit is received by the bailee the liability is different, for here the bailee will be strictly bound to use the utmost care, and will be liable for even slight neglect, so that if a person lends a horse to another, and the lendee lets his servant ride it, and it is injured without his fault or the fault of his servant, that will be quite sufficient slight neglect on his part to render him liable, for the horse was lent to him, and he had no right to let his servant ride it (q).

In the bailment *locatio rei*, or hiring of goods, the *Locatio rei*. bailee is bound to use ordinary diligence, and is liable for ordinary neglect, for here the bailment operates for the benefit of both parties; for that of the bailee in that he has the use of the goods, and for that of the bailor in that he has the amount agreed to be paid for the hire.

So also the bailment *vadium*, or pawn, is for the *Vadium, or* benefit of both parties, the pawner getting a loan of *pignori* money and the pawnee getting the use of the chattel, *acceptum*. or interest, or both, and so the liability of the pawnee is only to use ordinary diligence. To constitute a valid pledge there must be either an actual or constructive delivery of the article to the pawnee, and the bailee here looks not only to the property but to the person of the bailor, for if the subject of the bailment is lost and the bailee has used a proper amount of diligence, and the loss has occurred without any fault on his part, he may sue the bailor for the amount of the debt (r). It is not sufficient to exonerate a bailee from responsi-

(q) 1 S. L. C. 226.

(r) 1 S. L. C. 227.

bility for the loss of the subject of the bailment to shew that it was stolen, but he must also shew that he used due care to protect it (s). As to the right of the bailee in this kind of bailment, it was stated by Lord Holt, in his judgment in *Coggs v. Bernard* (t), that if it will do the article no harm he may use it (as, for instance the wearing of a jewel pawned), but such user will be at the peril of the bailee; but if the article will be the worse for using, then it must not be used, and the law now seems to be that the pawnee is generally never justified in so using the article pawned, except it be of such a nature that the bailee is at some expense to maintain it (as, for instance, a horse which naturally requires to be fed), for in such a case as this the bailee may use it in a reasonable way to recompense him for his expenditure (u).

Distinctions
between a
pawn, a lien,
and a mort-
gage of
personal
property.

A pawn requires to be carefully distinguished from a lien, and from a mortgage of personal estate (x). A lien generally speaking gives but a right to retain property and no active right in respect of it (y), a mortgage passes the actual property in the goods to the mortgagee, but a pledge simply gives a special or qualified property, and a limited right of possession. The proper remedy of a pawnee to recover his money is on reasonable notice to sell the subject of the pledge or to sue, or if necessary he may adopt both remedies (z). In the one case, however, of a pledge of title deeds, which constitutes an equitable mortgage, it is now an established rule that the proper remedy of the deposittee is to come to the Chancery Division of the Court asking for a foreclosure (a).

Pawnbrokers.

A certain practically very important kind of pawnees

(s) Chitty on Contracts, 432.

(t) 1 S. L. C. 211.

(u) Chitty on Contracts, 433.

(x) See 1 S. L. C. 228.

(y) See *ante*, p. 80.

(z) 1 S. L. C. 228.

(a) *James v. James*, L. R. 16 Eq. 153.

or pledgees are pawnbrokers, and at common law they stood on the same footing as other bailees of that class, and liable, therefore, as before stated. But it must appear that the system of pawning to those who make it their special and peculiar business is open to many abuses, both from the necessities persons may be under to induce them to pledge, the desire of others to part with things to which they have no right beyond that of possession, and the opportunities that pawnbrokers may have of advantaging themselves to the injury of the pawners, and accordingly the legislature has specially dealt with the subject. The present statute is the Pawnbrokers Act, 1872 (*b*), which, however, only deals with loans up to the sum of £10, and as to loans beyond that amount the ordinary law of pawns applies (*c*). By this statute every pledge must be redeemed within twelve months from the day of pawning, with seven additional days of grace (*d*), and if not redeemed within that time, and the amount for which the article is pledged does not exceed 10s., it becomes the pawnbroker's absolute property (*e*); but if for above 10s. then it is still redeemable until actual sale (*f*), and any such sale is only to be by public auction, and the surplus after the costs of the sale and the amount of the pledge is to be accounted for (*g*). As to an injury to the subject of the pledge by fire, formerly the pawnbroker was not liable unless it was proved that the fire took place through his default or neglect, but now he is absolutely so liable, and is, to protect himself, empowered to insure to the extent of the value of the goods (*h*). Formerly, also, as to goods which had been stolen, neither the pawnbroker nor a purchaser from him had a right to retain the goods as against the

Pawnbrokers
Act, 1872.

Pawnbroker is
now absolutely
liable for loss
by fire.

(*b*) 35 & 36 Vict. c. 93.

(*c*) On the old law, see *Pennell v. Attenborough*, 4 Q. B. 868.

(*d*) 35 & 36 Vict. c. 93, s. 16.

(*e*) Sect. 17.

(*f*) Sect. 18.

(*g*) Sect. 19.

(*h*) Sect. 27.

true owner, but now, upon conviction of the thief, the Court has a discretion to allow the pawnbroker to retain the goods as a security for the money advanced, or to order them to be returned to the true owner (i). If by the default or neglect of the pawnbroker the pledge suffers any injury or depreciation the owner may recover summarily a reasonable satisfaction for the same (k).

*Locatio
operis faciendi.*

In the case of
private persons
and those
exercising
a public
employment.

There remains but to consider that kind of bailment classified by Lord Holt as *locatio operis faciendi*, and as to this it is of two kinds; either a delivery to one exercising a public employment, *e.g.*, a carrier, or a delivery to a private person, *e.g.*, a factor or wharfinger. As to this latter kind they are only liable to do the best they can, or, in other words, are bound only to use ordinary diligence, so that such a bailee would not be liable for a robbery of goods happening without his fault, but in such a case it would have to be very clearly shewn that no care on his part could have prevented the robbery. On the other hand, as to the former kind, such a bailee stands in the position of an insurer liable for all losses, except those occurring by the act of God (l) or the king's enemies, and the reason on which this rule is founded has been stated with regard to carriers as follows:—"This is a politic establishment contrived by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust these sort of persons, that

(i) 35 & 36 Vict. c. 93, s. 30.

(k) Sect. 28.

(l) As to what will amount to an "act of God," we may quote the words used by Brett, J., in delivering the judgment of the Common Pleas Division of the High Court of Justice, in the recent case of *Nugent v. Smith* (L. R. 1 C. P. Div. 22, 23): "An injury can only be said . . . to have been occasioned by the act of God, when it has been occasioned directly and not indirectly by the extraordinary action of some physical force, the consequences of which could not be averted, or by some unexpected and extraordinary natural occurrence, which human foresight could not foresee, nor human power resist or prevent." It should, however, be noticed that the direct decision in this case was reversed on appeal (L. R. 1 C. P. Div. 423), but what is stated above does not appear to have been dissented from.

they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealing with them by combining with thieves, &c., and yet doing it in such a clandestine manner as would not be possible to be discovered" (*m*). But the above, though the correct rule at common law, is not so now, and it will be best to consider, firstly, the law of carriers, and then pass on to the law of innkeepers.

A common carrier has been defined as one who undertakes to transport from place to place for hire the goods of such persons as choose to employ him (*n*), and the rule is that to constitute a person a common carrier he must hold himself out expressly, or by course of conduct, as ready to engage in the transportation of goods for hire as a business, not merely as a casual occupation *pro hac vice*, and that a person who may undertake chance jobs is not a common carrier (*o*); also that he must be a person plying from one fixed terminus to another; but it has been held in a recent case that a barge-owner who let out a barge to different persons for different voyages was a common carrier, and liable as such, although he did not ply between any fixed termini, and the customer fixed in each particular case the point of arrival and departure (*p*). Railway companies, as to goods which they ordinarily carry, are common carriers.

Definition
of common
carrier.

The liability of a carrier at common law was for every loss, unless it arose by the act of God or the king's enemies, and the reason of this extraordinary liability was as has been stated by Lord Holt in his remarks on the subject already set out (*q*). It was fully in the

Liability of
carriers at
common law.

(*m*) Per Lord Holt, in his judgment in *Coggs v. Bernard*, 1 S. L. C. 213.

(*n*) *Palmer v. Grand Junction Ry. Co.*, 4 M. & W. 247.

(*o*) Chitty on Contracts, 439; *Brind v. Dale*, 2 M. & Rob. 80.

(*p*) *Liver Alkali Co. v. Johnson*, L. R. 9 Ex. 338. In this case, however, Brett, J., dissented from the opinion of the majority of the Court, viz., Blackburn, Mellor, Archibald, and Grove, JJ.

(*q*) *Ante*, p. 94.

power of carriers however to make any special contracts with their customers, in which their liability might be limited in any way agreed upon, and it became their practice to put up in their warehouses notices limiting their liability, and then if it could be proved that such a notice was brought to the knowledge of any particular customer, it was held to constitute a special contract with him, but if it could not be brought to his knowledge it was utterly ineffectual. No such notice, however, exonerated the carrier from liability for gross negligence (*r*).

The Carriers
Act (1 Wm. 4,
c. 68).

It was evident that this state of things could not continue, for it was constantly a difficult thing to determine whether in each particular case the notice had been brought to the customer's knowledge. Accordingly the Carriers Act (*s*) was passed, which provides (*t*) that no such carrier shall be liable for the loss of, or injury to, any valuable articles of the nature there specified,—such as gold, silver, watches, clocks, bills, notes, title deeds, stamps, engravings, silks, &c., contained in any parcel, which shall have been delivered, either to be carried for hire or to accompany the person of any passenger, where the value of such article shall exceed £10; unless at the time of the delivery of such article to be carried its value and nature shall have been declared, and an increased rate of charge paid, or agreed to be paid, which increased charge may be received, provided it is legibly notified in a conspicuous part of the office or warehouse, and such notification is to bind without proof of its having come to any customer's knowledge (*u*). Carriers who omit to affix the notice are precluded from the benefit of the Act so far as any right to extra charge is

(*r*) *Wyld v. Pickford*, 8 M. & W. 443.

(*s*) 11 Geo. 4 & 1 Wm. 4, c. 68. This Act only applies to carriers by land. As to carriers by sea, see *post*, ch. vi. p. 154.

(*t*) Sect. 1.

(*u*) Sect. 2.

concerned, but it seems that even in that case they are entitled to a declaration of the nature and value of the goods (x). The statute also provides (y) that no public notice or declaration shall have any binding effect, but nothing in the Act is to be construed to annul or in anywise affect any special contract between the carrier and the customer (z), and nothing in the Act is to extend to protect any carrier from any loss arising from the felonious acts of any person in his employ, or to protect any employee from any loss arising from his own personal misconduct or neglect (a). Although a customer may declare a package to be of some particular value, in the event of its loss the carrier is not precluded by that value, but may demand proof of the actual value, which is all he is liable for (b), and, as stated above, even although the carrier has omitted to put up any notification as to extra charge it appears he is entitled to a declaration of the value and nature of the goods (c).

In cases of goods not of the kind mentioned in the Act, or when the value is not above £10, then, in the absence of any special contract and subject to the Act next mentioned, the carrier's common law liability remains by the express provision of the Act, notwithstanding any public notice (d).

Where this Act does not apply carrier's common law liability remains.

Railway companies frequently escaped the provisions of this Act by putting notices on the receipts given to persons delivering goods to be carried, and this was held to constitute a special contract between the parties.

The Railway and Canal Traffic Act, 1854 (e), therefore

The Railway and Canal Traffic Act, 1854.

(x) 11 Geo. 4 & 1 Wm. 4, c. 68, s. 3, see *infra*, note (c).

(y) Sect. 4.

(z) Sect. 6.

(a) Sect. 8. As to "felonious acts" see *Gogarty v. Great S. & W. Ry. Co.*, 9 Irish Reports (C. L.) 233.

(b) Sect. 9.

(c) *Hart v. Bazendale*, 6 Ex. 769; *Pinciani v. L. & S. W. Ry.*, 18 C. B. 226.

(d) 11 Geo. 4 & 1 Wm. 4, c. 68, s. 4.

(e) 17 & 18 Vict. c. 31.

Difficulties in
construing
this Act.

provides (f) that no such notice shall have any effect, but that nothing therein contained is to prevent companies from making such conditions with respect to the forwarding and delivering of any goods as shall be adjudged *by the Court or judge* before whom any question relating thereto shall be tried, to be just and reasonable, and no special contract, as to the forwarding and delivering of any goods, shall be binding upon any one unless signed by him or the person delivering the goods to be carried. Very great difficulty has arisen on the construction of this provision, as to whether the statute only requires that there should be some special contract, and requires nothing as to the conditions to be contained in it, and that in addition to a special contract in writing signed, reasonable conditions may bind which are not made part of a contract, but only given notice of—or, to put the matter more directly in the shape of two questions, 1. When a condition is reasonable, does it require also to be reduced into writing and signed? and 2. When there is a special contract, can the question of its reasonableness be gone into? However, the weight of authority is certainly to answer both questions in the affirmative, and to treat the words “special contract” and “conditions,” used in the Act, as synonymous terms (g), so that there must always be a special contract in writing signed, and reasonable conditions contained therein. It has, however, been decided that the Act does not apply to contracts made by railway companies exempting themselves from liability by loss or detention beyond the limits of their own lines (h). The same Act (sect. 7) also exempts companies from liability for loss beyond (1) for horses the sum of £50, (2) neat

(f) Sect. 7.

(g) *Simons v. Great Western Ry. Co.*, 18 C. B. 805; *McManus v. Lancashire Ry. Co.*, 2 H. & N. 693; *North Stafford. Ry. Co. v. Peek*, E. B. & E. 986; and on appeal to the House of Lords, 32 L. J. (Q. B.) 241, in which the judges were divided in their opinion.

(h) *Zunz v. South Eastern Ry. Co.*, L. R. 4 Q. B. 539; *Doolan v. Midland Ry. Co.*, 10 Irish Reps. (C. L.) 47.

cattle £15, and (3) sheep and pigs £2 per head, unless a higher value is declared, and an increased rate paid, or agreed to be paid, to be notified as under the Carriers Act.

It has also been provided by the Railway Regulations Act, 1868 (i), that where a company by through booking contracts to carry partly by rail or canal and sea, a condition exempting such company from liability from any loss by danger of seas and navigation, published in a conspicuous manner in the office where the booking is effected, and printed in a legible manner on the receipt note, shall be perfectly valid. The statute 34 & 35 Vict. c. 78, s. 12, also provides that where any railway company under a contract for carrying persons, animals, or goods by sea, procures the same to be carried in a vessel not belonging to the railway company, their liability is to be the same as though the vessel had belonged to the company.

The carrier's duty is to carry all goods delivered to him of the kind that he usually carries, provided that he has room in his carriage, and the person delivering them is ready to pay his proper charge, such carrying to be by his ordinary route, and with reasonable diligence, and with regard to his charges for carrying, though he is entitled to be paid beforehand, yet he is not entitled to be paid before he has received the goods for carriage, so that in an action against him for not carrying it is sufficient to allege readiness and willingness to pay the amount of the carriage without proving actual tender of it (k). His liability ceases at the termination of the carrying, and where goods delivered to a railway company to be carried are carried partly on that and partly on another line, the original company will generally be liable unless they restrict their liability by a condition to that effect (l). As a general rule the

Liability when contract to carry partly by sea.

The duty of a carrier.

Carriage by a railway company over their own and another company's line.

The person to sue carrier is generally the consignee.

(i) 31 & 32 Vict. c. 119, s. 14.

(k) *Pickford v. Grand Junction Ry. Co.*, 8 M. & W. 372.

(l) *Zunz v. South Eastern Ry. Co.*, L. R. 4 Q. B. 539.

As to dangerous goods.

person to sue the carrier is the consignee, for the contract is really with him, the consignor being his agent to retain the carrier, but if the consignee has not acquired any property in the goods, then the consignor is the person to sue. It is the duty of any person delivering goods of a dangerous character to be carried to give notice of their dangerous character (n), and it is provided by statute (o) that where goods of a specially dangerous character are delivered to be warehoused or carried, the true name or description of such goods, with the words "specially dangerous," must be marked on them, and a notice in writing given to the warehouseman or carrier, or the person so delivering them is subject to imprisonment or fine.

As to railway passengers' personal luggage.

Railway companies are bound to carry passengers' personal luggage free of extra charge, and their liability as to it is that of common carriers, unless the passenger has taken it peculiarly into his custody (p). As to what will be comprehended under the term "personal" or "passenger" luggage, it may be stated to mean not only wearing apparel, but all things which under the particular circumstances of the case for convenience a passenger would ordinarily carry with him (q). If articles are deposited in the cloak room of a railway company then their position is that of ordinary bailees subject to the terms of any notices they may have issued (r).

Liability of carriers of passengers for injury to passengers.

With regard to the subject of the liability of carriers of passengers for injuries done to them, although it cannot be considered under the heading of the present chapter, yet it may be here convenient to inform the student that it is very different to that of common

(n) *Farrant v. Barnes*, 31 L. J. (C. P.) 137.

(o) 29 & 30 Vict. c. 69, s. 3.

(p) *Richards v. London, Brighton, and South Coast Ry. Co.*, 7 C. B. 839; *Talley v. Great Western Ry. Co.*, L. R. 6 C. P. 44.

(q) See on this point *Phelps v. London and North Western Ry. Co.*, 34 L. J. (C. P.) 259; *Macrow v. Great Western Ry. Co.*, L. R. 6 Q. B. 612.

(r) *Harris v. Great Western Ry. Co.*, L. R. 1 Q. B. Div. 515.

carriers of goods, who, as we have seen, are at common law insurers. The contract of a carrier of passengers is only to carry safely and securely as far as care and forethought on his part can go, and if an accident which he could not have prevented takes place, he is under no liability. There must be some negligence on his part shewn, and there must be no contributory negligence on the part of the passenger; a *primâ facie* case of neglect on the carrier's part will, however, be always made out by shewing that the vehicle was under his absolute control. This subject is considered hereafter under our division "Torts" (s).

An innkeeper may be defined as one who keeps a house where the traveller is supplied with everything that he has occasion for while on his way (t). He stands to a certain extent in a public capacity, and it is his duty to receive all guests with their goods who come to him, provided they are not drunk or disorderly, or suffering from any contagious disorder, and they tender to him a proper and fair amount for his charge; and if an innkeeper fail in this his duty, he is liable to be indicted, or to have an action for damages brought against him (u). By the common law the liability of an innkeeper is very extensive, being for all losses except those arising by the act of God, the King's enemies, or the fault of the guest, for very much the same reason, no doubt, as has been before stated with regard to carriers (x). The leading case on the liability of innkeepers is *Calye's Case* (y), in which it is laid down that to charge an innkeeper the following circumstances are necessary:—

Definition of
an innkeeper.

His duty.

His liability
at common
law.

Calye's Case.

1. The inn ought to be a common inn, so that in the case of lodging at some private person's house, and a

(s) *Post*, part 2, ch. vi. p. 338 *et seq.*

(t) *Thompson v. Lacy*, 2 B. & A. 283.

(u) *Fell v. Knight*, 10 L. J. (Ex.) 277.

(x) See *ante*, pp. 94, 95.

(y) 1 S. L. C. 131; 8 Coke, 32.

robbery there occurring, the landlord would not necessarily be liable.

2. The party ought to be a traveller or passenger.

3. The goods must be in the inn, and for this reason the innkeeper is not bound to answer for a horse put out to pasture.

4. There must be a default on the part of the innkeeper or his servants; and,

5. The loss must be to moveables, and therefore if a guest be beaten at an inn, the innkeeper shall not answer for it.

The Inn-keepers Act
(26 & 27 Vict.
c. 41).

The liability of innkeepers being, as above stated, so extensive, it was only natural that, in the course of time, it should be restricted in like manner as has been shewn the liability of carriers was restricted; and by the Innkeepers Act (z) it is provided (a) that no innkeeper shall be liable to make good any loss or injury to goods or property brought to his inn (not being a horse or other live animal, or any gear appertaining thereto, or any carriage), to a greater amount than £30, except (1) where the goods are stolen, lost, or injured through the wilful neglect or default of the innkeeper or any person in his employ; or (2) where the goods are deposited with him expressly for safe custody, in which latter case he may demand that the goods shall be placed in a sealed box or other receptacle. If an innkeeper refuses to receive goods for safe custody, or if by his default the guest is unable to so deposit them, he is not to have the benefit of the Act (b), and he must cause at least one *printed* copy of sect. 1 to be exhibited in a conspicuous part of the hall or entrance to the inn, and will only be entitled to the benefit of the Act whilst so exhibited (c).

(z) 26 & 27 Vict. c. 41.

(a) Sect. 1.

(b) Sect. 2.

(c) Sect. 3.

An innkeeper has no right to detain his guest's person till his bill is paid, but he has a right of lien on property brought by the guest to the inn, notwithstanding even that the property does not belong to the guest, or is not ordinary traveller's luggage (*d*), and with regard to carriages and horses, the lien is not limited to the charge for the keep of the horses and the care of the carriages, but extends to the whole charges against the guest (*e*). The Innkeepers Act, 1878, as before noticed, now gives the innkeeper a right of actively enforcing his lien (*f*). As before noticed on the decision in *Calye's Case* a lodging-house or boarding-house keeper is not liable as an innkeeper; he is liable only in a less degree, his duty being to use an ordinary amount of care with regard both to his guest and his guest's goods (*g*).

Innkeeper may detain guest's property, but not his person, to get payment.

Liability of lodging-house or boarding-house keeper not the same as innkeeper's.

We have now gone through the different kinds of bailments in Lord Holt's division in *Coggs v. Bernard* (*h*), on which it is apparent that another classification (which has been stated in various text-books), may be given. It has the advantage of simplicity, and is as follows:—

Another classification of bailment.

1. Bailments exclusively for the benefit of the bailor. (This will include those styled *depositum* and *mandatum*.)

2. Bailments exclusively for the benefit of the bailee. (This will include that styled *commodatum*.)

3. Bailments partly for the benefit of the bailor and

(*d*) *Snead v. Watkins*, 1 C. B. (N. S.) 267; *Threlfall v. Barwick*, L. R. 7 Q. B. 711. But this rule must not be taken in any way as applying to give an innkeeper any right of lien in respect of goods the property of a third person sent to the guest in the inn for a temporary purpose, *e.g.*, a piano or other article upon hire (*Broadwood v. Granara*, 10 Ex. 417).

(*e*) *Mullinger v. Florence*, 26 W. R. 385; 38 L. T. 167.

(*f*) *Ante*, p. 80.

(*g*) *Dansy v. Richardson*, 3 E. & B. 144. This case also shows the doubt on the point of the extent of the liability of such a person in case of a loss to his guest's goods, arising from his servant's negligence. See also as to lodging-houses, *Holder v. Soulby*, 8 C. B. (N. S.) 254.

(*h*) See *ante*, p. 89.

partly for the benefit of the bailee. (This will include those styled *locatio rei*, *vadium*, and *locatio operis faciendi*.)

Bailor or
bailee may
generally
maintain an
action in
respect of the
goods bailed.

There being a property in the case of goods bailed both in the bailor and bailee, generally speaking either may maintain an action in respect of the same (i).

(i) See also *post*, pp. 287, 288.

CHAPTER V.

OF MERCANTILE CONTRACTS, AND HEREIN OF BILLS OF EXCHANGE, PROMISSORY NOTES, AND CHEQUES.

ALTHOUGH for convenience the title given to this chapter is "Mercantile Contracts," &c., it must not be understood that the matters treated of in it are exclusively mercantile, but only more generally so; for instance, both agencies and partnerships may of course occur in matters not strictly mercantile.

Matters treated of in this chapter not exclusively mercantile.

It must be manifest that in many matters of ordinary business persons may be unable to do personally all acts coming within the scope of their transactions, and for this reason they employ other persons to act for them, and such persons are called agents for them the principals, and acts done by the agents are considered to be done by the principals by force of the maxim *Qui facit per alium facit per se*. Generally speaking, what a person can do himself he may do by an agent, and, ordinarily speaking, an agent may be authorized by mere word of mouth, but to execute a deed an agent must be authorized by deed, and the agent that is allowed under the 1st and 3rd sections of the Statute of Frauds (j) must be authorized by writing. No person can authorize another to do for him what he cannot do himself, for naturally he cannot pass to another a power which he never had himself; but though this is so, persons who cannot do acts for themselves are generally speaking competent to act as

Who are agents.

Qui facit per alium facit per se.

Persons not *sui juris* may nevertheless act as agents.

(j) 29 Car. 2, c. 3.

agents, *e.g.*, infants or married women, for they are exercising not their own, but another person's power (*k*).

The powers of an agent vary according to the authority he is invested with, and from these powers there are said to be three kinds of agencies:—

Three kinds
of agencies.

1. *Universal agency*, which is the largest and widest kind, being a general authority to do any acts without reference to their character, and this is not of constant occurrence.

2. *General agency*, which is the next largest, signifying a power to do all acts in some particular trade, business, or employment, *e.g.*, the authority that is vested in a wife to bind her husband for necessaries without any particular sanction on each occasion from him.

3. *Special agency*, which is the most limited and usual case of agency, being where a person has simply an authority to do some particular act for the principal (*l*).

Differences
between
universal
and general
agencies on
the one
hand, and
special agencies
on the other.

There is a very important difference to be noted between universal and general agencies on the one hand, and special agencies on the other hand, with regard to the power to bind the principal. In the former, even although the act exceeds the agent's authority in the particular instance, yet *if it comes within the scope of his ordinary authority* the principal is liable (*m*); thus, for instance, supposing a servant to have a general authority to order goods for his master, and the master one day withdraws that authority, yet if the servant

(*k*) See Story on Agency, p. 6; Co. Litt. 52 a.

(*l*) Ibid., p. 23 *et seq.*

(*m*) *Smethurst v. Taylor*, 12 M. & W. 545.

orders goods as theretofore, the tradesman not knowing of it, the master will be liable, because the act comes within the scope of the agent's ordinary authority. In the case of special agency this will not be so; it is the duty of the party contracting with such an agent to inquire and see as to the extent of his authority, and if he exceeds it the principal cannot be liable (n).

But although an act may be done without any authority from the principal, and therefore not bind him, yet *if at the time of doing the act the agent professed that he was acting for the principal* (o) it may be subsequently ratified by the principal, and become his act just as much as if he had authorized it beforehand, for the maxim is, *omnis rati habitio retrotrahitur et mandato priori æquiparatur* (p).

*Omnis
rati habitio
retrotrahitur
et mandato
priori æqui-
paratur.*

An important point on the law of principal and agent is as to the effect of a person contracting with an agent giving credit to the agent; of course, generally speaking, an agent incurs no personal liability, and the person contracting with him will charge his principal, but it may be that it is not known that he is an agent, or though known that he is an agent it is not known who his principal is, or, though both the above facts are known, the agent not contracting as agent it may be preferred to charge him to his principal. The law upon this point is that if the fact of the person being an agent is not known, or though the agency is known the name of the principal is not, though credit is first given to the agent, the principal on being discovered may be sued (q); but that if the principal is known, and credit has yet been given to the agent, the principal cannot afterwards be charged, for the person has made his election (r). The leading

*As to the effect
of giving credit
to an agent.*

(n) *East India Co. v. Hensley*, 1 Esp. 111.

(o) *Per Parker, J., Vere v. Ashby*, 10 B. & C. 288.

(p) *Macleay v. Dunn*, 4 Bing. 722.

(q) *Paterson v. Gandesequi*, 2 S. L. C. 360; 15 East, 62; *Addison v. Gandesequi*, 2 S. L. C. 369; 4 Taunt. 574.

(r) *Thomson v. Davenport*, 2 S. L. C. 377; 9 B. & C. 78.

Paterson v. Gandesequi; Addison v. Gandesequi; Thomson v. Davenport.

Cases in which agent personally liable.

cases referred to below of *Paterson v. Gandesequi*, *Addison v. Gandesequi*, and *Thomson v. Davenport*, are usually quoted together upon this subject.

The cases in which, contrary to the general rule, the agent incurs personal liability, may be stated to be as follows:—

1. Where the agent conceals his principal. Here we have just seen that though the agent is liable, it is in the option of the other contracting party on discovering the principal to sue either principal or agent.

2. Where he acts without authority, or after his authority has determined. But if he could not have known of the determination of his authority this would not be so; thus, an action was brought for necessities supplied to a woman after her husband's death whilst on a foreign voyage, but before she knew of his decease. By his death her authority to bind him for necessities was of course revoked, and his estate therefore could not be liable for them, and it was decided that she was not liable either on the before-stated ground (s).

3. Where, though having authority, he exceeds that authority, or fraudulently misrepresents its extent.

4. Where he specially pledges his own credit.

5. Where though contracting as agent, he uses words to bind himself, *e.g.*, if he covenants personally for himself and his heirs (t).

British agent contracting for foreign principal.

It was formerly a rule that where a British agent

(s) *Smout v. Ilbery*, 10 M. & W. 1.

(t) See hereon, *Thomas v. Edwards*, 2 M. & W. 216, and cases there quoted.

contracted for a foreign principal, the British agent might be sued, because it was said there was no responsible employer ; but this is not now so, the rule being that in all cases of this kind it is entirely a question of intention whether under the particular circumstances the credit was intended to be given to the agent or the principal (u).

An agent's authority may be determined in any of the following ways, i.e. :—

The different ways in which an agent's authority may be determined.

1. By the principal's revocation of it, and death will operate as a revocation. If by the act of the principal the agency is revoked, in the case of a special agency nothing further done by the agent will bind the principal, but in the case of a general or universal agency, the revocation will not bind third persons until made known to them (x); for as we have seen in these agencies, the principal may be bound if the act comes within the scope of the agent's ordinary authority (y). In ordinary cases, special notice should be given by the principal to all persons who have been in the habit of dealing with the agent, and in addition he should give a general notice in the *Gazette*.

2. By the agent's renunciation with the principal's consent.

3. By the principal's bankruptcy.

4. By the object of the agency being accomplished.

5. By the effluxion of time ; and

6. By the marriage of a *feme sole* agent (z).

(u) *Green v. Kopke*, 25 L. J. (C. P.) 297.

(x) *Monk v. Clayton*, Moll. 270 ; cited in *Nickson v. Brohan*, 10 Mod. 110.

(y) *Ante*, p. 106.

(z) See hereon, Story on Agency, p. 481.

An agent's
authority
includes all
incidental acts.

Unless a contrary intention appears, the authority given to an agent must be taken to include all incidental acts necessary for accomplishing the principal object; for instance, a person sending another to a shop to buy goods without giving him money, gives to him the necessary incidental power of pledging his credit (a).

The principal
not the agent,
should
generally sue
on contract.

The proper person to sue on a contract is, generally speaking, the principal and not the agent, unless he has some special property or interest in the subject-matter of the contract by way of commission or otherwise, *e.g.*, a carrier or an auctioneer (b). If an agent is remunerated, he is bound to use ordinary diligence; if unremunerated, then, by analogy to the case of a voluntary bailee (c), he is only liable for gross negligence, unless he is possessed of any special skill or knowledge, when an omission to use such skill, or negligence, will be imputable to him for gross negligence (d); his duty is always to act fairly and honestly, and keep proper accounts and vouchers, and he may lose his right to any commission he might otherwise be entitled to by not doing so (e).

His liability
and duty.

Del credere
agent.

A *del credere* agent is one who agrees with his principal, in consideration of some additional compensation, to guarantee to him the payment of debts to become due from buyers. Although the undertaking of a *del credere* agent is certainly a collateral promise to answer for the debt of another, yet it has been decided that his engagement need not be in writing (f) as is necessary, as we have seen, in the case of guarantees (g). The

(a) Story on Agency, p. 77.

(b) *Robinson v. Rutter*, 4 E. & B. 954.

(c) As to which see *ante*, pp. 89, 90.

(d) See *Coggs v. Bernard*, 1 S. L. C. 199; Lord Raymond, 909; *Wilson v. Brett*, 11 M. & W. 113.

(e) See hereon, *Stainton v. The Carron Co.*, 24 Beav. 353.

(f) *Coutourier v. Hastie*, 8 Ex. 40. *Wickham v. Wickham*, 2 K. & J. 478.

(g) *Ante*, p. 40.

reason of this is that the contract of the *del credere* agent is not to guarantee the solvency of those who purchase from him, but it is in substance a contract with the principal that if he sells the goods he will pay or cause to be paid the price to his principal.

Factors and brokers are peculiarly mercantile agents, being employed constantly to effect sales; the difference between them being that the broker has not possession of the goods he is selling for his principal, but the factor has (*h*). At common law, if goods were placed in a factor's hands for sale, he having only a power to sell and not to pledge, he could not give any title by way of pledge, that not being within the usual scope of his authority, and this being considered by the mercantile community as an undue restriction of the operations of commerce, certain Acts (*i*), usually known as the "Factors Acts," have been passed. By the first of these Acts (6 & 7 Geo. 4, c. 94) it is provided (*k*) that a person intrusted (that is a factor or agent intrusted as such) (*l*) with and in possession of any bill of lading is to be deemed the true owner of any goods described in it so far as to give validity to any sale, disposition, pledge, or deposit, provided that the buyer, disponent, or pledgee have no notice of his not being the *bonâ fide* owner. But if any deposit or pledge is made as a security for any pre-existing demand the depositor or pledgee acquires only the same interest that was possessed by the person making the deposit or pledge (*m*), and if any person accepts a deposit or pledge knowing that the person is a factor or agent he only acquires such interest as was possessed by the factor or agent at the time of the deposit or pledge (*n*).

Difference
between
factors and
brokers.

Factor's
powers to
bind his
principal by
pledge at
common law,
and under the
Factors Acts.

6 & 7 Geo. 4,
c. 94.

(*h*) *Baring v. Corrie*, 2 B. & Ald. 137.

(*i*) 6 & 7 Geo. 4, c. 94; 5 & 6 Vict. c. 39; 40 & 41 Vict. c. 39.

(*k*) Sect. 2.

(*l*) *Per* Bramwell, L.J., *Johnson v. Crédit Lyonnais*, L. R. 3 C. P. D. 32; 47 L. J. (C. P.) 241.

(*m*) 6 & 7 Geo. 4, c. 94, s. 3.

(*n*) Sect. 5.

5 & 6 Vict.
c. 39.

By the 5 & 6 Vict. c. 39, it is provided (o) that any agent entrusted with the possession of goods or of the documents of title to goods shall be deemed and taken to be the true owner of such goods and documents so far as to give validity to any contract or agreement by way of pledge, lien, or security *bonâ fide* made by any person with such agent so intrusted as aforesaid, as well for any original loan, advance, or payment made upon the security of such goods or documents, as also for any further or continuing advance in respect thereof, and such contract or agreement shall be binding and good against the owner of such goods and all persons interested therein *notwithstanding the person claiming such pledge or lien may have had notice that the person with whom such contract or agreement is made is only an agent.*

The provisions of these statutes have been held to apply not generally but to mercantile transactions only (p). It was also held that where a vendor had been left by his vendee in possession of documents of title to goods, he could not under the before mentioned Acts confer good title upon a *bonâ fide* pledgee (q).

40 & 41 Vict.
c. 39.

It has, however, now been provided by the 40 & 41 Vict. c. 39 (r) that where any goods have been sold, and the vendor or any person on his behalf continues or is in possession of the documents of title thereto, any sale, pledge, or other disposition of the goods or documents made by such vendor, or any person or agent intrusted by him with the goods or documents so continuing or being in possession, shall be as valid and effectual as if such vendor or person were an agent or person intrusted by the vendee with the goods or

(o) Sect. 1.

(p) *Wood v. Rowcliffe*, 6 Hare, 191; *Monk v. Whittenbury*, 2 B. & A. 484.

(q) *Johnson v. Crédit Lyonnais Co.*, *Johnson v. Blumenthal*, L. R. 3 C. P. D. 32; 47 L. J., C. P. 241.

(r) Sect. 3.

documents within the meaning of the two previous Acts, provided that the person to whom the sale, pledge, or other disposition is made has not notice that the goods have been previously sold.

With regard to the possession of a vendee the 40 & 41 Vict. c. 39 (s) also provides that where any goods have been sold or contracted to be sold, and the vendee or any person on his behalf obtains the possession of the documents of title thereto from the vendor or his agent, any sale, pledge, or disposition of such goods or documents by such vendee so in possession or by any other person or agent intrusted by the vendee with the documents within the meaning of the two previous Acts, shall be as valid and effectual as if such vendee or other person were an agent or person intrusted by the vendor with the documents within the meaning of the previous Acts, provided that the person to whom the sale, pledge, or other disposition is made has not notice of lien or other right of the vendor in respect of the goods.

Notwithstanding that the authority of such agent may be revoked if he still continue in possession of the goods or documents of title thereto, he can give a good title either by sale or pledge to persons taking without notice of such revocation (t).

The case of *George v. Clagett* (u) is an important decision on the principle of set-off with regard to factors. It decides that if goods are bought of a factor, the buyer not knowing that he is but a factor, and the principal sues, the buyer may set off against him any claim he might have set off against the factor had the action been brought by him; but if he knew he was a factor at the time, then he cannot. And it has been decided that it makes no difference that the buyer had the means of knowing that the person with

(s) Sect. 4.

(t) 40 & 41 Vict. c. 39, s. 2.

(u) 2 S. L. C. 118; 7 T. R. 359.

whom he contracted was only a factor, and that to bring a case within the principle of *George v. Clagett*, and enable a defendant to set up against the principal a set-off that he would have been entitled to as against the factor, all that is necessary is that actually he did not know, at the time of the contracting and of the accrual of the set-off, that the person was a factor (*x*).

It has also been decided, somewhat extending the case of *George v. Clagett*, but yet strictly within its principle, that though the buyer knew at the time of buying of the person being a factor, yet he is entitled to this benefit of set-off if he honestly believed that the factor was entitled to sell and was selling to repay himself advances made for his principal (*y*).

Partnership.

Actual partner.

Nominal partner.

Dormant partner.

A partnership may be either actual or nominal; actual where two or more persons agree to combine money, labour, or skill in a common undertaking sharing profit and loss; and nominal where a person allows his name to be held out to the world as a partner without having any real interest in the concern (*z*). An actual partnership, again, may be divided into the ordinary partnership where a person has an interest and his name appears; and a dormant partnership, where a person, though having an interest, does not appear to the world as a partner. To deal with the simplest matter first, a nominal partner is not always liable; he is only liable where he has held himself out to the person seeking to charge him, and induced him to believe him to be a partner (*a*).

When nominal partner liable.

In the case last cited below, Parke, J., in considering whether or not a person was liable as a nominal partner, said: "If it could be proved that the de-

(*x*) *Borries v. Imperial Ottoman Bank*, L. R. 9 C. P. 38.

(*y*) *Warner v. McKay*, 1 M. & W. 595. See further, on set-off generally, *post*, pp. 216-218.

(*z*) *Waugh v. Carver*, 2 Hen. Blackstone, 235; 1 S. L. C. 908, and notes.

(*a*) *Dickenson v. Valpy*, 10 B. & C. 140.

defendant had held himself out to be a partner, not 'to the world,' for that is a loose expression, but to the plaintiff himself, or under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it and believed him to be a partner, he would be liable to the plaintiff in all transactions in which he engaged, and gave credit to the defendant upon the faith of his being a partner. The defendant would be bound by an indirect representation to the plaintiff arising from his conduct, as much as if he had stated to him directly and in express terms that he was a partner, and the plaintiff had acted upon that statement." If, however, a person had express notice that the person he is seeking to charge was only nominally a partner, then it seems (b) (though this point is not absolutely beyond doubt (c)) that he cannot be charged.

With regard to what will be sufficient to constitute an ordinary partnership, the rule is that to constitute persons partners amongst themselves they must share in profits and losses (d); but with respect to third persons, it was formerly held that if they shared in the profits in any way, whether for their own benefit or as trustees for the benefit of others, that was sufficient to render them liable as partners (e). The decisions tending to this point have however been altered in a great measure by the leading case of *Cox v. Hickman* (f), and by the statute 28 & 29 Vict. c. 86.

What will constitute a partnership as between the parties themselves, and as regards third parties.

The facts in the case of *Cox v. Hickman* were shortly stated as follows: Two partners, S. and S., becoming embarrassed, executed a deed whereby they assigned their property to trustees, whom they empowered to carry on their business under the name of the Stanton Iron Company, and to do all acts necessary in such business, and with power for the majority of

Cox v. Hickman.

(b) *Alderson v. Pope*, 1 Camp. 404, n.

(c) See *Young v. Axtell*, cited in *Waugh v. Carver*, 1 S. L. C. 918.

(d) *Waugh v. Carver*, 1 S. L. C. 908; 2 Hen. Blackstone, 235.

(e) *Chitty on Contracts*, 215.

(f) 8 H. of L. Cas. 268.

the creditors assembled at a meeting to make rules for conducting the business, or to put an end to it, and after the debts had been discharged the property was to be re-transferred by the trustees to S. and S. Two of the creditors, C. and N., were named amongst the trustees, and of these two C. never acted, and N. only acted for six weeks, and then resigned. Some time afterwards the other trustees, who continued to carry on the business, became indebted to one H., and gave him bills accepted by themselves *per proc.* the Stanton Iron Company. It was sought to make C. and N. liable on these bills as being partners as regarded third persons, they having, at any rate for a time, participated in the profits of the concern, not only as trustees for the creditors generally, but also for their own advantage in their capacity of creditors of S. and S. It was, however, decided that there was no partnership created by the deed, and that, consequently, they could not be sued upon the bills, and that to constitute a partnership, even with regard to third parties, it must be shewn that the person or persons carrying on the business were duly authorized to do so by the person or persons sought to be charged. "And it appears to be now established" (from this and other decisions) "that although a right to participate in the profits of a trade is a strong test of partnership, and there may be cases where, from such participation alone, it may be inferred, not as a presumption of law, but a fact, that a partnership existed, yet the question whether that relation does or does not exist must in each case depend on the real intention and contract of the parties" (g).

28 & 29 Vict.
c. 86.

The statute 28 & 29 Vict. c. 86, provides as follows :—

1. "The advance of money by way of loan to a

(g) Chitty on Contracts, 215, and see the cases there cited in support of this statement.

person engaged or about to engage in any trade or undertaking upon a contract in writing with such person that the lender shall receive a rate of interest varying with the profits or shall receive a share of the profits arising from the carrying on of such trade or undertaking, shall not of itself constitute the lender a partner with the person or persons carrying on such trade or undertaking, or render him responsible as such " (h).

2. " No contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking by a share of the profits of such trade or undertaking, shall of itself render such servant or agent responsible as a partner therein, nor give him the rights of a partner " (i).

3. " No person being the widow or child of the deceased partner of a trader, and receiving by way of annuity a portion of the profits made by such trader in his business, shall, by reason only of such receipt, be deemed to be a partner of, or to be subject to any liabilities incurred by, such trader " (k).

4. " No person receiving by way of annuity or otherwise a portion of the profits of any business in consideration of the sale by him of the goodwill of such business, shall, by reason only of such receipt, be deemed to be a partner of, or to be subject to the liabilities of, the person carrying on such business " (l).

In the case, however, of any such trader becoming bankrupt, or compounding with his creditors, or dying in insolvent circumstances, the lender of any such loan, or the vendor of any such goodwill, is not to be entitled to recover any portion of his principal or

(h) 28 & 29 Vict. c. 86, s. 1.

(i) Sect. 2.

(k) Sect. 3.

(l) Sect. 4.

profits until the claim of other creditors for value have been satisfied (*m*).

The effect of this statute.

The case of *Cox v. Hickman* goes beyond the statute, and is more extensive than it.

The effect of this statute is simply that in the four cases given the fact of a participation of the profits is not *per se* to be any evidence of the existence of a partnership, as it would have been at common law (*n*). Considering the decision in the case of *Cox v. Hickman*, there appears to have been but slight occasion for the passing of this Act, as under the decision in that case, as stated (*o*), it was decided already that the question of partnership or no partnership must always depend on the intention of the parties, and in neither of the four cases given in the statute would there ordinarily be any intention to create a partnership (*p*). However the statute if it does no good does no harm, and at any rate puts the matters mentioned in it very plainly. *Cox v. Hickman* goes beyond the four mentioned cases in the statute, and in any question upon what will be sufficient to constitute a partnership as regards third persons it is necessary to refer to the statute and the case.

Liability of a dormant partner.

A dormant partner is liable on contracts entered into with the firm, and this although he was not known at the time to be a partner (*q*).

Liability of a firm for acts done by one partner in it.

An important point on the law of partners is as to the liability of members of a firm for acts done by others of them. Partners as to each other stand in the position of general agents, and as we have seen (*r*) that a general agent is able to bind his principal, even though without authority, if the act comes within the scope of his ordinary authority, so with partners, as the great

(*m*) 28 & 29 Vict. c. 86, s. 5.

(*n*) Chitty on Contracts, 220; Broom's Coms. 541; 1 S. L. C. 939.

(*o*) *Ante*, pp. 115, 116.

(*p*) See 1 S. L. C. 938 939.

(*q*) Chitty on Contracts, 216.

(*r*) *Ante*, p. 106.

criterion of a partnership is that each member stands in the relation of a principal to the other members (s), so the question as to liability on a contract made by one partner is not, was it done by the other's direct authority, but did it come within the scope of the ordinary partnership transactions? and if so, then all the partners are liable (t). So, for instance, though a bill of exchange given without authority by one member of a non-mercantile firm (e.g., solicitors) would not bind the others as not being within the scope of their business (u), yet if given by a member of a trading partnership it would bind the others (x). One partner cannot bind his firm by a submission to arbitration (y), nor by borrowing money (z), nor by giving a guarantee (a), nor by executing a deed unless authorized by them by deed (except, indeed, as to releases); but it has been decided that if a partner executes a deed in the presence of and by the express consent of his co-partners in a matter in which they are commonly interested, it binds all (b).

The question is, did the act come within the scope of the ordinary business?

Particular cases.

No new member can be introduced into a partnership firm without the consent of all the members; a person is not liable on contracts entered into before he became a member of a firm, and his liability ceases on his leaving the firm, provided he gives a general notice in the *Gazette*, and also a particular notice to persons who have been in the habit of dealing with the firm (c), and though, of course, his liability continues in respect of debts incurred whilst he was a member of the firm, yet if any creditors expressly or impliedly accept the credit of the new instead of the former firm, this exonerates

Introduction of a new partner, and his position.

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- (s) See *Cox v. Hickman*, cited ante, p. 115.
 - (t) *Sandiland v. Marsh*, 2 B. & Ald. 672.
 - (u) *Harman v. Johnson*, 2 El. & Bl. 61.
 - (x) *Kirk v. Blurton*, 9 M. & W. 284.
 - (y) *Stead v. Salt*, 3 Bing. 101.
 - (z) *Fisher v. Taylor*, 2 Hare, 218.
 - (a) *Hasleham v. Young*, L. R. 5 Q. B. 833.
 - (b) *Ball v. Dunsterville*, 4 T. R. 313.
 - (c) *Kirwan v. Kirwan*, 2 C. & M. 617.

him from liability. As to a dormant partner, it will always be sufficient for him to give notice only to the persons who knew of his connection with the firm (*d*).

How a partnership may be dissolved.

A partnership is liable to be dissolved in any of the following ways (*e*):—

1. By effluxion of time;

2. By mutual consent;

3. If a partnership at will by a notice, unless such dissolution would be in ill faith, or would work irreparable injury;

4. By a general assignment by one or more partners, or by execution on the partnership effects by a creditor of one of the partners, or by an assignment of his share in the business, or by his bankruptcy, or outlawry, or attainder for treason or felony;

5. By death of a partner;

6. By marriage of a female partner; and

Grounds on which Chancery will decree a dissolution.

7. By decree of the Chancery Division of the High Court of Justice, which will be granted on any of the following grounds;

1. Where the partnership originated in any fraud, misrepresentation, or oppression.

2. Where one of the partners has been guilty of some gross misconduct in the partnership matters, acting in breach of the trust and

(*d*) *Evans v. Drummond*, 4 Esp. 89.

(*e*) See Chitty on Contracts, 236–238; Snell's Principles of Equity, 428.

confidence between the partners, or where he wilfully and permanently absents himself from the business.

3. Where there have been continual breaches of the partnership contract.
4. Where by reason of disagreement between the partners, it has become impossible to carry on the partnership business.
5. Where an active partner becomes permanently insane (*f*).

All partners must be competent to contract, so that neither an infant nor a married woman (except by special custom, or in cases in which she is to be considered as a *feme sole* (*g*)) can be a partner, though an alien may now be, unless the partnership embraces the holding of a British ship or ships, or any share therein (*h*). An executor of a deceased partner may be let in as a partner, but he becomes liable personally as any other partner, though he is simply acting in trust, and not himself taking any benefit (*i*). On the death of a partner his interest in the partnership stock goes to his executors, and the outstanding debts, &c., go to the surviving partners, but they are trustees for the representatives of the deceased partner to the extent of his share or interest (*k*).

In an action against partners it is not now necessary to sue all the members in their individual names, but they may be sued in the name of the firm (*l*), and, on

All partners must generally be competent to contract.

Partners may be sued in their partnership name under the Judicature Act, 1875.

(*f*) Snell's Principles of Equity, 497-500.

(*g*) See *post*, ch. vii. p. 184.

(*h*) See 33 Vict. c. 14, s. 14; *post*, ch. vii. pp. 195, 196.

(*i*) *Wightman v. Townroe*, 1 M. & S. 412.

(*k*) This pertains more to the Principles of Equity, and the student is referred to Mr. Snell's work thereon, 495-504.

(*l*) Judicature Act, 1875, Order XVI. r. 10; and see also Order IX. r. 6.

judgment against partners in the name of the firm, execution may issue in any of the following ways :—

(1.) “ Against any property of the partners as such ;

(2.) “ Against any person who has admitted on the pleadings that he is, or has been adjudged to be, a partner ;

(3.) “ Against any person who has been served as a partner with the writ of summons, and has failed to appear.

“ If the party who has obtained judgment claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to the Court or a judge for leave so do ; and the Court or judge may give such leave if the liability be not disputed, or, if such liability be disputed, may order that the liability of such person be tried and determined in any manner in which any issue or question in an action may be tried and determined ” (*m*).

Remedies
between
partners.

At common law as a general rule one partner could not sue another. This rule was, however, subject to these exceptions, viz :—(1) where an account had been gone through between the parties, and a balance struck and agreed on ; (2) where money had been received by one partner for the private use of the other, and wrongfully carried to the partnership account ; and (3) where one partner had improperly used the partnership name in making a promissory note for his own private debt, and it had been paid by the other (*n*). The proper remedy between partners was formerly in the Court of Chancery for a dissolution and ac-

(*m*) Judicature Act, 1875, Order XLII. r. 8. See hereon Indermaur's Manual of Practice, 85, 86.

(*n*) Chitty on Contracts, 225.

count (o), and it is clear that now, where formerly a bill in Chancery would have been necessary, the plaintiff, by his writ in the High Court of Justice, must claim an account, and the proper division for such accounts is the Chancery Division, such matters being specially assigned to that division (p), so that for all practical purposes this matter stands on the same footing as before.

Bills of exchange, promissory notes, and cheques being all *choses in action*, it will be well first to devote a few lines to the explanation of that term. A *chose* *Choses in action.* *in action* may be defined as signifying some outstanding thing, and the right of action in respect of that thing (q), e.g., where any debt is owing to a person; and originally *choses in action* could not be assigned or transferred, *Choses in action where not assignable at law.* the policy of our laws being to prevent the springing up of litigation (r), and the only way of affecting such an object was by giving to any assignee a power of attorney to sue in the assignor's name. But such assignments were allowed in equity, and to the original common law rule there have grown up exceptions as follows:— *Exceptions to that rule.*

1. Contracts made with the sovereign (s);
2. Bills of exchange, promissory notes, and cheques by force of the custom of merchants;
3. Bills of lading by force of 18 & 19 Vict. c. 111;
4. Bail bonds (t);
5. Life policies by force of 30 & 31 Vict. c. 144,

(o) See Snell's Principles of Equity, 495.

(p) Judicature Act, 1873, s. 34.

(q) Brown's Law Dict. 61, title "Chose."

(r) See Co. Litt. 214 a.

(s) See Broom's Coms. 431.

(t) See stat. of 4 & 5 Anne, c. 16, s. 120.

provided notice in writing is given to the insurance office ;

6. Marine policies by force of 31 & 32 Vict. c. 86 ;

7. Assignments of *choses in action* of a bankrupt in pursuance of the Bankruptcy Act, 1869 (*u*) ; and

Provision of
Judicature
Act, 1873,
on the sub-
ject.

8. By the Judicature Act, 1873 (*v*), it is now provided that “ any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal *chose in action*, of which express notice in writing shall have been given to the debtor, trustee, or other person, from whom the assignor would have been entitled to receive or claim such debt or *chose in action*, shall be, and be deemed to have been, effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed), to pass and transfer the legal right to such debt or *chose in action* from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor : Provided always, that if the debtor, trustee, or other person liable in respect of such debt or *chose in action* shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or *chose in action*, he shall be entitled, if he thinks fit, to call upon the several persons making claims thereto to interplead concerning the same, or he may, if he thinks fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees.”

The effect of this provision is now to make it the

(*u*) 32 & 33 Vict. c. 71, s. 111.

(*v*) 36 & 37 Vict. c. 66, s. 25 (6).

general rule that *choses in action* are assignable so as to enable the assignee to sue in his own name if notice in writing is given to the holder of the *chose*, but the student will notice that the enactment does not extend to assignments by way of charge, but only to absolute assignments.

Bills of exchange, promissory notes, and cheques, owe their origin to the law merchant. The system of exchange did not originate in England, but was anciently made use of at Athens, some provinces of France, and some few other places, and brought to perfection in Italy, from whence it appears to have been introduced to our country. A bill of exchange may be defined as a written order or request by one person to another to pay a certain sum of money to him or bearer or order: a promissory note as a written promise by one person to another to pay a certain sum of money to him or bearer or order (x); and a cheque as a written order by a customer to his banker to pay a certain sum to a person therein specified or bearer or order. For those not conversant with such matters to properly understand the subject it seems necessary to first explain the advantages to be derived by the means of bills of exchange, and this is best shewn by an example. Suppose B. to owe money to A., but it has been arranged that payment shall not be made for say three months; in the ordinary course of things A. would simply have to wait that time for his money, which he would be deprived of using for that period. But A. may draw a bill of exchange, directed to B, requesting him to pay to him or his order the amount due three months after date, and A. would here be called the drawer, and also the payee, as it is payable to him, and B. would be called the drawee. At first this would not have full effect, but B., the drawee, then signifies his acquiescence in it

The origin of the system of exchange.

Explanation of advantages derived from the use of bills of exchange and promissory notes.

(x) A bank note is in effect a promissory note payable to bearer on demand. See Byles on Bills, p. 9.

by—as it is called—accepting it, that is, writing the word “Accepted” across it and signing his name, and it is then handed back to the drawer and payee, A. (y) The advantage to A. is that he can then transfer it over to any one to whom he in his turn may owe money, who will at the proper time get payment from the acceptor, and thus the original drawer quickly turns his money over. If the bill is payable to him or bearer, the transfer is effected by simply handing it over; if to him or order, by his indorsing his name on the back, when he, in addition to being the drawer, becomes an indorser, and the person to whom he indorses it an indorsee, who in his turn may indorse it over to some one else, and so it may pass on to any extent. When the time mentioned in the bill is up, and the bill therefore becomes due, the then holder of it presents it to the person who originated it, viz., the acceptor; and if he pays it, the bill has operated and been used as money, and served as such between the other parties, though actually no money has passed between them. The bill might even have a still more extended operation, for it need not necessarily be made payable to the drawer. Say B. in India owes money to A. here, who in his turn owes money to C. in India: A. can draw a bill on B. payable to C. and send it to India; and it can be accepted and placed in C.’s hands, who, when it is due, obtains payment from B., and A.’s debt to him is thus liquidated without the actual transmission of money from England to India. A promissory note is not quite so practically useful as a bill of exchange, but nearly so, and remarks as to the one will generally apply to the other. To take an example of one: if B. owes money to A. he can sign a promissory note, of which he will be called the maker, to pay at a certain time to A. (who will be called the payee), or order, or bearer, and A. can then transfer it over to any one to whom he owes money, becoming if he indorses it an indorser,

(y) As to acceptance see now, 41 Vict. c. 13, *post*, p. 128.

and the person to whom he indorses it an indorsee, and, when due, it will be presented to the maker and payment obtained. Of course in both the bill of exchange and the promissory note the ultimate holder's claim is not only against the founder of the bill or note, but if he acts properly (as is hereafter detailed) he has a claim against every prior party. The following is a form of a bill of exchange and of a promissory note respectively :

Form of bill of exchange and of promissory note.

FORM OF A BILL OF EXCHANGE.

— months after date ^A ~~for~~ on demand, or at sight, or
— months after sight, or ~~at~~ some other period] pay to my
order [or pay to the order of ^B E. F., or pay to E. F. or bearer]
Five hundred pounds for value received.

Stamp varying according to amount.

A. B.

To Mr. C. D., of, &c.

FORM OF A PROMISSORY NOTE.

— months after date [or on demand, or at sight, or —
months after sight, or at some other period] I promise to pay
to C. D. or order [or to C. D. or bearer] Five hundred pounds
for value received.

Stamp varying according to amount.

A. B.

On these forms it should be remarked that there is no virtue in the words at the end of each, "for value received," and that the instruments would be just as valid if those words were omitted. If the words "or order" or "or bearer" are not inserted the instrument will not be negotiable as a bill of exchange or promissory note (z), though now, in consequence of the provision of the Judicature Act, 1873, before mentioned, the debt might be assigned as therein provided (a). Bills of exchange and promissory notes are by custom required to be in writing, and it is also expressly pro-

Bills and notes must be in writing, and so must an acceptance on a bill.

(z) Byles on Bills, 85.

(a) See *ante*, p. 124.

vided by statute (b) that the acceptance of an inland bill must be in writing on such bill, and this is now equally necessary in the case of a foreign bill (c). With regard to such acceptance it was held that the mere writing by the drawee of his name across the instrument without adding the word "accepted" was not a sufficient acceptance to satisfy the statute (d). The contrary has, however, now been provided by statute, so that the simple signature of the drawee across the bill is sufficient (e).

Two classes
of persons
liable on bills
and notes.

From the foregoing remarks the student will have observed—as indeed has been expressly pointed out—that there are two classes of persons liable on bills of exchange and promissory notes, viz., (1) Those primarily liable on a bill, who are the acceptor or acceptors, and on a note the maker or makers; and (2) Those not so primarily liable, who are the drawer and the indorser or indorsers, and therefore the positions of the parties are similar to that of creditor, principal debtor, and surety, the holder for the time being, being the creditor, the acceptor of a bill or maker of a note the principal debtor, and all other parties the sureties.

The engage-
ment of an
acceptor of
a bill is to
pay according
to its tenor.

The engagement of the acceptor is to pay the bill according to its tenor (f), and as a general rule only he can accept a bill to whom it is addressed, but to this rule there is an exception, for suppose the person to whom the bill is directed cannot be found, or through infancy or any other cause cannot accept, some other person may accept for him to prevent his being sued, and such an acceptance is called an acceptance for honour (g), and such an acceptor, an acceptor for

Acceptance
for honour,
or *supra*
protest.

(b) 1 & 2 Geo. 4, c. 78, s. 2.

(c) 19 & 20 Vict. c. 97, s. 6.

(d) *Hindlehaugh v. Blakey*, 26 W. R. 480.

(e) 41 Vict. c. 13.

(f) Byles on Bills, 187.

(g) It is sometimes also called an acceptance *supra* protest, because it can only be so accepted after the bill has been protested. See Byles on Bills, 267.

honour (*h*). An acceptance for honour is not of constant occurrence. The person to whom the bill is directed, and who becomes the acceptor, may be either an ordinary acceptor who owes money to the drawer, or an accommodation acceptor, *i.e.*, one who accepts without consideration for the convenience of the drawer, and with a view to his raising money upon it, or otherwise using it (*i*). An accommodation acceptor is equally liable as any ordinary acceptor to pay the bill to any holder except the drawer, and it is no defence to an action by an indorsee for value against an accommodation acceptor who has received no consideration, that at the time the plaintiff took the bill he knew the defendant had received no value and even took it after it was done; unless, indeed, the defendant took it of a person who held it for a particular purpose, and was therefore guilty of a breach of trust in transferring it to the plaintiff, and the plaintiff at the time of taking it was cognizant of the circumstances (*k*). The drawer of a bill for whose accommodation it has been accepted is bound to indemnify the accommodation acceptor (*l*); but if an accommodation acceptor in an action brought against him on the bill to which he evidently has no defence, yet does defend it, he cannot recover against the person accommodated the costs of the action (*m*). Parol evidence may always be given to shew that as between the original parties to a bill there was no consideration, or that the consideration has failed, or that a fraud has been practised on the defendant. Following however the general rule that parol evidence may never be given to contradict or vary a written contract (*n*), evidence of some contemporaneous parol agreement entered into between the parties cannot be

Liability of an accommodation acceptor.

(*h*) Byles on Bills 268.,
 (*i*) Broom's Coms. 438.
 (*k*) Byles on Bills, 123-131.
 (*l*) *Ibid.* 132.
 (*m*) *Beech v. Jones*, 5 C. B. 696.
 (*n*) See *ante*, p. 23.

admitted to contradict or vary the contract which appears on the face of the bill (*o*).

An acceptance may be either general or qualified, but a drawer is entitled to a general acceptance.

The acceptance to a bill may be made in two different ways; it may be either a general or absolute acceptance (and the drawer is not bound to receive any acceptance other than this), or it may be a qualified acceptance (*p*).

The rules as to bills apply generally equally to promissory notes.

The maker of a note may also simply promise to pay generally, or in some qualified way. If he has made the note without consideration he will stand in the same position as an accommodation acceptor, and, generally speaking, the rules as to bills of exchange apply equally to promissory notes.

An indorsement of a bill or note may be special or in blank.

Position of indorsers.

Indorsement *sans recours*.

Sale of a bill or note.

A person indorsing a bill or note, may either make his indorsement specially, or, as it is sometimes called, in full, *i.e.*, to some particular person, or in blank, by simply signing his name; and when this latter course is taken it may be transferred by mere delivery, although originally payable to order (*q*). Although, as has been said, parties other than the acceptor of a bill and maker of a note stand but in the position of sureties for those persons respectively, yet as between each other they stand in the relation of principals, every indorser being looked upon in the light of a new drawer (*r*); any indorser may, however, so indorse a bill as to be under no liability on it by putting after his name the words "*sans recours*," or, "without recourse to me," or words to the like effect (*s*), *e.g.*, if A. has a bill payable to his order and accepted by B., and C. is willing to purchase it of him and look only to B. to pay it, the transaction might be effected safely in this way. With regard also to a person transferring a bill or note, if it

(*o*) *Young v. Austen*, L. R. 4 C. P. 553; *Aubrey v. Cruz*, L. R. 5 C. P. 37.

(*p*) *Byles on Bills*, 195, 196.

(*q*) *Ibid.* 151.

(*r*) *Ibid.* 153.

(*s*) *Ibid.* 154.

is payable to bearer and he transfers it—as he may do—without indorsement, this, generally speaking, operates as a sale of the security, and no action will in such a case lie against the transferor in the event of the dishonour of the instrument (t).

A bill may be accepted or a note made, or either may be indorsed by an agent “*per procuration*,” and as these words shew that he is acting under some particular authority, it is the duty of the taker of any such instrument to inquire into the extent of it, and if the agent has no authority, or has exceeded it, the principal will not be liable (u), and it seems that if a person without any authority does such an act he may be sued for the misrepresentation which is contained in it, even although he did not do it fraudulently, but that he cannot himself be charged as the acceptor of the bill, because no one can be liable as acceptor but the person to whom the bill is addressed, except an acceptor for honour (x).

If an executor or administrator, or any other person in a like capacity, indorses a bill without restricting his liability, he will incur personal responsibility on it; if he does not desire to do this he should indorse “*sans recours*,” or expressly confine his liability to the extent of the estate of which he is executor or administrator (y).

Bills and notes may be made payable at different times, i.e., on demand, at sight, on presentation, or so many days or months after a certain time, and the most usual kind of bills or notes are those payable a certain fixed time after date, and it is important to observe that the term “month” in a bill or note signifies a calendar month (z). These instruments are not payable at

(t) Byles on Bills, 161, and cases there quoted.

(u) Broom's Coms. 450, 451.

(x) *Polhill v. Walter*, 3 B. & A. 114.

(y) Byles on Bills, 58.

(z) *Ibid.* 82, *ante*, p. 26.

the exact end of the time named in them, but in addition to that time there is allowed, by the custom of merchants, three further days which are called "days of grace," so that a bill dated the 1st of January, and payable three months after date, is not actually due and payable until the 4th of April (*a*). These "days of grace" do not of course exist in bills or notes payable on demand, and they are not now allowed on bills or notes payable at sight or on presentation, it being provided that such instruments drawn after the 14th of August, 1871, shall for all purposes whatsoever be deemed to be bills or notes payable on demand (*b*).

Where no time named bill or note deemed payable on demand. The Statute of Limitations runs from the date of instruments payable on demand.

All bills or notes in which no time for payment is specified are deemed payable on demand (*c*), and with regard to instruments so payable it should be noted that it is not necessary before bringing an action thereon that any demand should actually be made, and the Statute of Limitations will run from the date of making the instrument and not from the time of demand (*d*); but if an instrument is made payable a certain time after demand, *e.g.*, one month after demand, then the statute does not commence to run until a demand has been made and the period named after such demand has expired (*e*).

Quære, however, from when it runs in bills or notes at sight, or on presentation.

As to bills or notes payable at sight or on presentation, or a certain time after sight or presentation, the rule is that as no right of action accrues until after presentment, the statute does not commence to run until presentment or the lapse of the time specified after presentment (*f*).

(*a*) Byles on Bills, 209. "Days of grace are so called because they were formerly allowed the drawee as a favour; but the laws of commercial countries have long since recognised them as a right." Ibid.

(*b*) 34 & 35 Vict. c. 74, s. 2.

(*c*) Byles on Bills, 215.

(*d*) Ibid. 347.

(*e*) *Thorpe v. Coombe*, R. & M. 388.

(*f*) Byles on Bills, 346, 347. Whether this is so now with regard to bills or notes simply payable at sight or on presentation, may however in the opinion of the author be considered very doubtful, the 34 & 35 Vict.

If a bill or note contains no date, parol evidence is admissible to supply the time of its having been made. Foreign bills are often drawn payable at a "usance" or two or more "usances," which signifies the period or periods customary for payment between the two countries where the bills are drawn and payable respectively (g).

Parol evidence admissible to supply a date.
Usance.

"A person who accepts a bill of exchange or makes a promissory note payable on a given day is liable to pay it when that day arrives, though no demand is made. He must be aware of the contract he has entered into, and he has no right to say that he is taken by surprise, for he is bound to provide for payment on the day when the bill becomes due" (h). Of course this does not apply to an instrument payable at or after sight or on presentation, for in such cases it is not payable unless and until it is so presented; again, it will not apply in the case of a qualified acceptance, and on this point it is very necessary to clearly understand what is a qualified acceptance. By it is meant an acceptance whereby the bill is made payable at a particular place, and not *otherwise or elsewhere*, for it is specially provided by statute (i) that if a bill shall be accepted payable at a banker's or some other place, such acceptance shall be but a general acceptance; but if the acceptance expresses that it is payable at a place, and "not otherwise or elsewhere," then it is a qualified acceptance, and the acceptor shall not be liable to pay unless payment shall have been first demanded at the particular place named (k). The presentment required

As to presentment and notice of dishonour.

What is meant by a qualified acceptance.
1 & 2 Geo. 4, c. 78.

c. 74, s. 2, providing, as has been already stated, that such instruments shall "for all purposes whatsoever" be deemed as payable on demand; and as in instruments payable on demand, the statute runs from the date, it would seem, on a strict construction of this statute, that it has the effect of making the rule the same as to instruments payable at sight or on presentation. This point does not appear to be noticed in the last edition of Byles on Bills, and the author is not aware that it has ever been raised.

(g) Byles on Bills, 209, 210.

(h) Per Channell, B., *Maltby v. Murrell*, 5 H. & N. 823.

(i) 1 & 2 Geo. 4. c. 78.

(k) Sect. 1.

This statute does not apply to promissory notes.

in this case to charge the acceptor need not be actually on the exact day that the bill falls due, so long as the presentment is made (*l*). But the foregoing statute does not apply to promissory notes; and if, therefore, a promissory note is expressed, in the body of it, to be payable at a certain place, presentment at that place is necessary to charge the maker (*m*). The law on this point, therefore, is, that to charge an acceptor presentment is not necessary unless accepted payable *only* at a particular place; but to charge the maker of a note if it is expressed to be payable at a place, though not only at that place, yet presentment is necessary; but in both cases it is not essential that presentment should be made on the exact day.

To charge drawer or indorsers there must always be presentment and notice of dishonour.

But the rule expressed on the previous page in the words of Mr. Baron Channell applies only to the parties primarily liable, *i.e.*, the acceptor of a bill and the maker of a note; as to the parties not so primarily liable, *i.e.*, the drawer or indorsers of a bill or the indorsers of a note, it has no application, for they are only liable on the default of the party primarily responsible, and the holder must have performed conditions incumbent on him by the custom of merchants, and the rule is, that it is necessary for him to present the instrument to the person primarily liable on the very day it becomes due, and if dishonoured to give notice of its dishonour, unless the notice of dishonour is waived (*n*). As to the presentment, even when necessary to charge the acceptor or maker, we have seen that it need not be on the actual day of the instrument becoming due (*o*), but to charge the other parties the presentment must be on the exact day (*p*). When, however, a bill or note becomes due on a Sunday, Christmas Day, Good Friday,

Instrument falling due on a Sunday, &c., or a Bank holiday.

(*l*) See *Rhodes v. Gent*, 5 B. & Ald. 244.

(*m*) Byles on Bills, 218.

(*n*) See hereon, Byles on Bills, 205–221, and also generally hereon, judgment in *Jones v. Broadhurst*, 9 C. B. 173.

(*o*) *Supra*.

(*p*) Byles on Bills, 215.

public fast or thanksgiving day, the instrument is presentable and payable on the day preceding such day (*q*); but if it becomes due on a Bank holiday, it is presentable and payable on the day following such day (*r*).

As to notice of dishonour, the law requires it to be given for this reason, "because it is presumed that the bill is drawn on account of the drawee's having effects of the drawer in his hands; and if the latter has notice that the bill is not . . . paid, he may withdraw them immediately" (*s*). Upon this point of notice of dishonour three questions require attention:—

First. What will be sufficient notice of dishonour? And the answer to this question is, that though no formal notice is required, yet mere knowledge of the probability that a bill or note will be dishonoured, or even actual knowledge of the dishonour, will not be sufficient, but there must be some intimation given by the holder to any intermediate person he seeks to charge that he does not intend to give credit to the acceptor (*t*).

Secondly. To whom must the notice of dishonour be given? The answer to which question is that notice must be given to all persons the holder intends to charge; but if he gives notice to the one preceding him, who in his turn gives notice to the one preceding him, and so on throughout, these notices will all operate for the benefit of the holder, each person having his day to give notice; but if this link of notices is once broken, then the liability of the other persons to whom notice has not been given is destroyed. The proper course is, therefore, for the holder to always give notice to every prior party he intends to charge (*u*).

(*q*) Byles on Bills, 210.

(*r*) 34 Vict. c. 17, s. 1; 38 Vict. c. 13.

(*s*) Per Buller, J., *Bickerdike v. Bollman*, 2 S. L. C. 58.

(*t*) Broom's Coms. 441, 442.

(*u*) Byles on Bills, 292.

Within what
time notice of
dishonour
must be given.

Thirdly. Within what time is notice of dishonour to be given? The answer to this question is that the holder and every one to whom notice is given must give his notice within such a time that the person or persons he seeks to charge, if living or carrying on business at or near the same place, may receive it during the day after the day of dishonour, or the day after the person giving the notice himself received notice of dishonour; if not so living at or near the same place, then it must be sent by post during such day, or if no post, then on the next post day; and in the case of a foreign bill or note, it must be sent by the next ordinary conveyance. If the instrument is with a banker, then there is an additional day for the notice, the banker having first one day to give his customer, the holder, notice; and if the notice is received on a Sunday, or other day of public rest, it is deemed as received on the day following (x).

Exception to
the rule re-
quiring notice
of dishonour to
be given.
Bickerdike v.
Bollman.

There is one very important exception to the rule requiring notice of dishonour of a bill to be given to charge the parties not primarily liable. This exception is established by the leading case of *Bickerdike v Bollman* (y), and is to the effect that it is not necessary to give notice of dishonour of a bill to the drawer of it, if he (the drawer) had no effects in the hands of the drawee, so that he could not be injured for want of notice. This is the case of an accommodation acceptance, and may be illustrated thus:—A. draws on B., who accepts for A.'s accommodation, and on presentment to B. the bill is dishonoured: to entitle the holder to sue A. it is not necessary to give him any notice of dishonour, because as he had no assets in B.'s hands he cannot possibly be injured. Cases subsequent to *Bickerdike v. Bollman* have, however, laid down that its principle is not to be extended (z), and therefore it

(x) Byles on Bills, 286–289.

(y) 2 S. L. C. 51; 1 T. R. 406.

(z) 2 S. L. C. 60.

has been decided upon it that it does not apply, and that the drawer is entitled to notice, where he has reason to believe that a third person will provide for payment of the bill, e.g., where the bill is both drawn and accepted for the benefit of an indorser, for here the party expected to meet it is such indorser (a).

It is a rule not only as to bills and notes, but as to all instruments generally, that any material alteration after execution will vitiate the instrument, except as to persons consenting to such alteration (b). This is particularly shewn in the leading case of *Master v. Miller* (c), where it was held that an unauthorized alteration of the date of a bill of exchange after acceptance, whereby the payment would be accelerated, avoids the instrument, and no action can afterwards be brought upon it, even by an innocent holder for valuable consideration.

Effect of alterations in bills and other instruments.

Master v. Miller.

In a very recent case the question was whether the unauthorized alteration by a third party of a cheque dated March 2, by adding the figure "6" after the figure "2," so as to make the instrument purport to bear date March 26, was such a material alteration as to discharge the drawer, and the Court held that the alteration was material, and that the drawer was discharged from liability (d).

But if an alteration is made in an instrument which is not material, such alteration will have no effect; thus, where a promissory note expressed no time for payment (and therefore, as we have seen (e), was payable on demand), and the holder inserted the words "on demand," it was held such alteration did not affect

(a) See *Cory v. Scott*, 3 B. & Ald. 619.

(b) *Pigot's Case*, 11 Rep. at fol. 27 a; *Master v. Miller*, 1 S. L. C. 857; 4 T. R. 320.

(c) *Supra*.

(d) *Vance v. Lowther*, L. R. 1 Ex. D. 176.

(e) *Ante*, p. 132.

the validity of the instrument, for it, in fact, made it nothing more than it was before (*f*).

Difference
in transfer of
a bill or note
before and
after it
becomes due.

Miller v. Race.

Any person who takes a bill or note after it has become due takes it subject to all the equities it was liable to in the hands of the prior party (*g*), but such an instrument transferred before it becomes due has certain advantages annexed to it from the principle of the law merchant to give the fullest currency and effect to it (*h*). One of the chief of these advantages is that, although a person has found such an instrument, or acquired it by means of fraud, or even stolen it, yet provided it is payable to bearer, or to order and has been indorsed in blank, it will pass like cash by mere delivery, and the holder, though his own title to it is bad, yet may confer a good title to it (*i*). This principle was established in favour of all negotiable instruments by the case of *Miller v. Race* (*k*); but it must be carefully borne in mind that if the instrument is not negotiable, as if in the body of it the words "or bearer," or "or order," are not made use of (*l*), or if it is payable to order, and not indorsed, the thief or finder cannot pass any title to it by forging the indorsement (*m*), except, indeed, as against himself. But to enable the principle of the above-mentioned case of *Miller v. Race* to apply, it is necessary that the instrument should have been taken for valuable consideration and *bonâ fide*, for if there are any *mala fides*, then being in the nature of specific property, the true owner has a right to recover; but any *mala fides* must be alleged and clearly proved (*n*), and the mere fact of a person not having exercised the fullest caution in taking such

(*f*) *Aldous v. Cornwell*, L. R. 3 Q. B. 575.

(*g*) Per Lord Ellenborough in *Tinson v. Francis*, 1 Camp. 19.

(*h*) It may be noticed that if a bill is assigned on the day it becomes due, it is considered as assigned before it became due. See Byles on Bills, 170.

(*i*) Broom's Coms. 453.

(*k*) 1 S. L. C. 516; 1 Burr. 452.

(*l*) See *ante*, p. 127. As to crossing a cheque "not negotiable" see *post*, p. 149.

(*m*) Byles on Bills, 337.

(*n*) *Goodman v. Harvey*, 4 A. & E. 870; *Usher v. Rich*, 10 A. & E. 784.

an instrument will not be sufficient to deprive him of his benefit as transferee. To do this actual *mala fides* must exist, and even gross negligence and want of caution in taking the instrument is not sufficient to deprive the transferee of his rights, and can simply operate as evidence of *mala fides*. If however a transferee wilfully shuts his eyes to manifest circumstances of suspicion in a case in which he must have concluded there was something wrong and have purposely forbore from inquiry, then this is equivalent to *mala fides (o)*.

Upon the point of consideration, the recent case of *Currie v. Misa (p)* may be noticed, it deciding that a pre-existing debt due to the holder of a negotiable instrument is a sufficient consideration for its having been handed to him, just as much as if it had been a fresh advance. In that case the defendant drew a cheque for £1999. 3s. in favour of one Lizardi or bearer, and Lizardi paid it to the plaintiffs, his bankers, in consideration and on account of an amount owing to them exceeding that sum on his overdrawn account. Before presentment of the cheque Lizardi stopped payment, whereby the consideration for the defendant giving the cheque failed, and he accordingly instructed his bankers not to honour it, and this was an action brought to recover the amount. There was no doubt that had the cheque been parted with to the plaintiffs for value then paid *bonâ fide* without notice, they could have recovered, and the Court decided that they could do so here, the already existing debt being equivalent to a fresh advance.

Pre-existing debt a sufficient consideration.
Currie v. Misa.

The general rule is, that no title can be obtained through a forgery, and if a bill or note bearing a forged indorsement is paid by a banker the loss will fall on him and not on the customer, in which re-

No title can be obtained through a forgery.

(o) *Goodman v. Harvey*, 4 A. & E. 870; *Raphael v. Bank of England*, 17 C. B. 161; *Jones v. Gordon*, 2 App. Cas. 616; 1 S. L. C. 540-545.

(p) L. R. 10 Ex. 153; on appeal, 1 App. Cas. 554.

spect it is now different to a cheque, as is hereafter noticed (*q*).

How the liability on a bill or note may be discharged.

Acts which will operate to discharge sureties will operate to discharge drawer or indorsers.

Noting and protesting necessary for a foreign, but not for an inland bill.

What is an inland and what is a foreign bill.

The liability on bills and notes may be discharged in different ways, and especially as to different parties to them. If the person primarily liable on such an instrument pays the amount, that necessarily discharges all the other parties, but if a person not so primarily liable pays it, then only he and parties subsequent to him are discharged, and the liability of prior parties remains. Irrespective of payment the obligation on such an instrument may be discharged at any time before breach by parol, without any consideration (*r*), also as to parties not primarily liable by omission to present and give due notice of dishonour, and as (as has been pointed out (*s*)) the position of the parties is similar to that of creditor, principal debtor, and surety, any act that will operate to discharge sureties will operate to discharge parties not primarily liable on bills and notes (*t*). Noting or protesting is not necessary to entitle a person to sue on an inland bill or note, though even as to them noting is very usual, but in the case of a foreign bill both noting and protesting are generally necessary. By the noting is meant a minute made by a notary public or consul of the fact of the presentment and dishonour of the instrument; and by the protesting is meant a solemn declaration by the same official that the instrument has been presented for payment and dishonoured. An inland bill is one both drawn *and* payable in the United Kingdom, or the Islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them, being part of the dominions of her Majesty (*u*), and a foreign bill is one either drawn abroad *or* payable abroad. The chief peculiarities of a foreign bill in

(*q*) See *post*, p. 145.

(*r*) Byles on Bills, 236.

(*s*) *Ante*, p. 128.

(*t*) For the acts that will operate to discharge sureties, see *ante*, pp. 41, 42.

(*u*) 19 & 20 Vict. c. 97, s. 7.

which it differs from an inland one are, that it may be stamped after execution ; it generally requires noting and protesting ; it is most usually drawn in parts ; it is frequently drawn at one or more " usance," and with regard to the law which governs such bills, when both drawn and payable abroad, they will be construed according to the foreign law ; when drawn here and accepted abroad the liability of the drawer is according to our law, and that of the acceptor according to the foreign law, and where drawn abroad and accepted here the liability of the drawer will be according to the foreign law, and that of the acceptor according to our law (x).

A receipt given on the back of a bill or note for the money requires no receipt stamp (y), and a person paying a negotiable instrument has a right to the possession of it (z).

Receipt on back of a bill or note requires no stamp.

Promissory notes, bills of exchange, or drafts, or undertakings in writing, being negotiable or transferable for the payment of any sum or sums of money less than the sum of 20s. in the whole, are prohibited under a penalty of £5 (a). Certain penalties were also required in the case of such instruments above 20s. but less than £5 (b), but this statute is not in force at the present time (c).

Bills and notes for less than 20s. prohibited.

If an instrument is on its face so ambiguous that it is doubtful whether it is meant as a bill or a note, it is in the election of the holder to treat it as either, and where a person gave a note for money borrowed " which I promise *never* to pay," it was held that the word " never" might be rejected (d). A corporation cannot bind itself

Ambiguous instrument.

(x) Broom's Coms. 464, 465.

(y) 33 & 34 Vict. c. 97, Schedule, title " Receipt, Exemptions."

(z) Byles on Bills, 228.

(a) 48 Geo. 3, c. 88, ss. 2, 3.

(b) 17 Geo. 3, c. 30.

(c) 42 & 43 Vict. c. 67, continues its repeal till 31st December, 1880.

(d) Chitty on Contracts, 94.

by a bill or note unless incorporated for the very purpose of trade (e).

Effect of
loss of a
negotiable
instrument.

The effect of losing a negotiable instrument formerly was that no action could be brought in respect of the amount payable thereon, because there was always the possibility that it might have got into the hands of a *bonâ fide* holder for value ; but equity would have given relief on a proper indemnity being given on the principle of an accident, and by the Common Law Procedure Act, 1854 (f), power was given at law for the Court or a judge to order that the loss should not be set up on a like indemnity.

Bill or note
carries
interest.

A bill or note carries interest from the time of dishonour as regards the acceptor or maker thereof, and as regards any other party liable thereon from the time of notice of dishonour having been given to such other party, and it has been decided that when a person guarantees payment of a bill or note, he is liable not only for the principal amount of it, but also for interest (g).

18 & 19 Vict.
c. 67, as to
procedure.

In the case of bills of exchange or promissory notes, a special remedy was provided by the Summary Procedure on Bills of Exchange Act, 1855 (h), for under that statute the holder of such an instrument, provided it is not more than six months overdue, may issue a writ of summons, to which the defendant cannot appear as a matter of course, but only on leave to be obtained from a judge, which leave will only be granted on paying the amount claimed into court, or shewing upon affidavit a defence upon the merits. If within twelve days of service of the writ the defendant does not get this leave and appear, the plaintiff may at once sign final judgment and issue execution. The

(e) Chitty on Contracts, 94, 249.

(f) 17 & 18 Vict. c. 125, s. 87.

(g) *Ackerman v. Ehrensperger*, 16 M. & W. 99.

(h) 18 & 19 Vict. c. 67. Cheques are included under "Bills and Notes" in this statute.

holder may sue all the prior parties in one action, but all subsequent proceedings are as if separate writs had been issued. However by the recent rules of April, 1880, no such writ can now be issued (i). Rules of April, 1880.

It is not necessarily any defence to an action brought on a bill or note that after the day for payment the defendant tendered the amount to the plaintiff, for he has committed a breach in not paying on the day, and the plaintiff's claim may be for damages beyond the mere amount of the bill (k).

To sum up as to bills and notes, the following may be stated as the chief points in which they differ from other ordinary simple contracts :— Summary of differences between bills and notes and other simple contracts.

1. They must always be in writing by the custom of merchants.

2. They must always be stamped, and as to inland bills before execution.

3. They import a consideration, so that it need not appear on their face (l).

4. They carry interest.

5. They are negotiable.

6. There was until lately a special procedure on them under 18 & 19 Vict. c. 67.

The relation existing between a banker and his customer is not that of trustee and *cestui que trust*, but "the customer lends money to the banker and the banker promises to repay that money, and, whilst indebted, to pay the whole or any part of the debt to any person to whom his creditor, the customer, in the ordi- Relation existing between banker and customer.

(i) Rule 3 April, 1880. The reason of the rule is that on account of Order XIV. the special procedure was practically no longer necessary. See Indermaur's Manual of Practice, 37, 43.

(k) *Hume v. Peplow*, 8 East, 168.

(l) A guarantee is the same on this point, see 19 & 20 Vict. c. 97, s. 3, *ante*, p. 41.

nary way requires him to pay it" (*m*), and this debt is paid by the banker honouring his customer's bills, notes, and cheques.

Cheques.

A cheque has already been defined as a written order by a customer to his banker to pay a certain sum to a person therein specified, or bearer, or order; the drawer of the cheque is the person primarily liable, and it is the duty of a banker to cash his customer's cheques if he has assets of that customer, and if he fails in this duty an action will lie against him, even although the customer has sustained no actual loss or damage by his

The rules as to bills and notes apply generally to cheques.

Time within which a cheque should be presented.

But non-presentment does not necessarily discharge the drawer of the cheque.

A banker paying a forged cheque bears the loss; but *aliter* now if he pays a cheque with a forged indorsement.

act (*n*). Cheques are not intended, like bills and notes, for circulation, and are not entitled to any days of grace, but, generally speaking, the rules as to the former instruments apply to them. A person receiving a cheque should present it for payment within a reasonable time, that is, if the banker is in the same place it should be presented during the next day, and if in a different place, forwarded for presentment within that time, and presented by the person to whom so forwarded within the day after he receives it (*o*), and on the dishonour of a cheque the drawer is entitled to notice, unless there were no sufficient assets at the bank when he would naturally have expected the cheque to be presented, and he had no reasonable expectation that it would be cashed (*p*). The non-presentment, however, of a cheque within the proper time will not operate to destroy the holder's right to recover, unless in the meantime the banker has failed, having assets of the customer in his hands (*q*).

If a banker pays a cheque to which the drawer's signature has been forged, or a cheque which has been fraudulently altered so as to increase its amount, he

(*m*) Per Alderson, B., in *Robarts v. Tucker*, 16 Q. B. 575; Broom's Coms. 454, 455.

(*n*) *Marzetti v. Williams*, 1 B. & A. 415.

(*o*) Byles on Bills, 20, 21.

(*p*) *Ibid.* 24, 298.

(*q*) *Ibid.* 20.

(the banker) must bear the loss incurred thereby, unless it has been caused by the customer's negligence (r). The liability of a banker in the case of his paying a cheque bearing a forged indorsement was formerly the same, but this being considered a hardship on bankers, who whilst they may reasonably be supposed to know their customers' signatures cannot possibly be expected to know the signatures of payees, it has been provided with regard to indorsement that the banker shall be discharged if the cheque purports to be duly indorsed, so that in the case of the forged indorsement of a cheque the loss now falls on the customer (s). If a banker pays money on a customer's cheque to some third person, he cannot, on discovering that such customer has overdrawn his account, recover back the sum he has paid (t); thus, in the case just cited below, the facts were that the plaintiff had presented a cheque at the defendant's banking-house, and the defendant's cashier counted out the amount in notes, gold, and silver. The plaintiff took up the amount, counted it once, and was in the act of counting it again when the cashier (having discovered that the drawer's account was overdrawn), demanded the money back, and upon the plaintiff's refusal, detained him, and obliged him to give it up. The plaintiff now brought this action for the assault and false imprisonment by the cashier, and it was held that he was entitled to recover, the property in the money having passed to the plaintiff, and there being in consequence no right to demand it back again.

If a banker pays a customer's cheque to a third person he cannot recover amount from that person on finding customer has overdrawn his account.

Cheques are frequently crossed, that is, they have the name of some banker written across them, or simply the words "& Co.," leaving the name of the particular banker to be supplied. The subject of crossed cheques, irrespective of any statute, is well dealt with in ' Byles

Crossing cheques.

(r) *Robarts v. Tucker*, 16 Q. B. 560; *Young v. Grote*, 4 Bing. 253; and see *Baxendale v. Bennett*, L. R. 3 Q. B. Div. 525.

(s) 16 & 17 Vict. c. 59.

(t) *Chambers v. Miller*, 13 C. B. (N.S.) 125.

Meaning,
object, and
effect of, at
common law,
as stated by
Sir J. B. Byles,
in his work
on Bills.

on Bills,' as follows:—"It has long been a common practice, not only in the city of London, but, throughout England, to write across a cheque the name of a banker. The meaning of this crossing was to direct the drawees to pay the cheque only to the banker whose name was written across; and the object was to invalidate the payment to a wrongful holder in case of loss; but it has been held that at common law the *effect* is to direct the drawees to pay the cheque, not to any particular banker, but only to some banker, and not to restrict its negotiability. Therefore, as between the banker and his customer, the circumstance of the banker paying a crossed cheque otherwise than through another banker, is at common law strong evidence of negligence on the part of the banker, rendering him responsible to his customer. *The holder may at common law erase the name of the banker and either substitute that of another banker or leave the words ' & Co.' remaining alone.* It is also not unusual to write the words ' & Co.' only in the first instance, leaving the particular banker's name to be filled up afterwards or not, so as to insure the presentment by some banker or other" (u).

21 & 22 Vict.
c. 79.

By an Act passed in 1858 to amend the law relating to cheques or drafts on bankers, it was provided (x) that "whenever a cheque or draft on any banker, payable to bearer or to order on demand, shall be issued crossed with the name of a banker or with two transverse lines with the words ' & Company,' or any abbreviation thereof, such words and crossing shall be deemed a material part of the cheque or draft, and, except as hereafter mentioned, shall not be obliterated, or added to, or altered, by any person whomsoever after the issuing thereof; and the banker upon whom such cheque or draft shall be drawn shall not pay such cheque or draft to any other than the banker with whose

(u) Byles on Bills, 26.

(x) 21 & 22 Vict. c. 79.

name such cheque or draft shall be so crossed, or, if, the same be crossed as aforesaid without a banker's name, to any other than a banker " (y). The statute also provided that the lawful holder of a cheque or draft uncrossed might cross it, or might put in the name of any banker when it had been crossed only with the words "&Co.," and the banker then should not pay such cheque or draft to any other than the banker with whose name it was crossed (z). The fraudulently cancelling, destroying, or obliterating the crossing of a cheque is an offence against the criminal law (a).

A construction was, however, lately put upon this statute which, though well founded upon principle, yet undoubtedly took the whole mercantile community by surprise. In the case of *Smith v Union Bank of London* (b) the facts were that Mills and others drew a cheque on their bankers, the defendants, payable to the order of the plaintiff, who received it, indorsed it, and crossed it with the London and County Banking Company's name. The cheque was then stolen, and never reached the London and County Banking Company, but came to the hands of a customer of the London and Westminster Bank as a *bonâ fide* holder for value. That person paid it into the London and Westminster Banking Company, who presented it to the defendants, and they paid it, notwithstanding that it was crossed on the London and County Bank. The plaintiff then brought his action, treating himself as owner of the cheque, to recover the amount of it from the defendants, on the ground that their paying it was contrary to the provisions of 21 & 22 Vict. c. 79. The Court, however, held that the statute did not affect the negotiability of the cheque; the

Smith v.
Union Bank
of London.

(y) 21 & 22 Vict. c. 79, s. 1.

(z) Sect. 2.

(a) Sect. 3 of 21 & 22 Vict. c. 79, was repealed by 24 & 25 Vict. c. 95; but see now 24 & 25 Vict. c. 96, s. 27.

(b) L. R. 10 Q. B. 221; affirmed on appeal, L. R. 1 Q. B. Div. 31.

plaintiff had indorsed the cheque so that the customer of the London and Westminster Bank had become a *bonâ fide* holder of it before it was presented to the defendants, and the plaintiff was not the holder; and there was nothing in the statute to give the plaintiff, who had ceased to be the holder, any right of action against the defendants.

Reason of this decision.

The reason of the decision may perhaps be found in the fact that the person who got payment was a lawful holder, and as he might in various ways have got payment strictly according to the crossing,—*e.g.*, by opening an account with the London and County Bank, or paying it into the account of a friend who banked there—he was allowed to do directly what he might have done indirectly. As to what really was the effect of the statute 21 & 22 Vict. c. 79, it may be well to quote the following extract from the judgment of the Court of Appeal delivered by Lord Cairns:—"It is asked, what then is the effect of the statute in enabling the payee to cross a cheque? We think the answer is easy. It imposes caution at least on the bankers. But further, by its express words it alters the mandate, and the customer, the drawer, is entitled to object to being charged with it if paid contrary to his altered direction. This must often operate for the benefit of the payee or holder who had crossed the cheque. Further, if in addition to the cheque being crossed the signature of the payee was forged, he would retain his property, and could recover it from the banker notwithstanding 16 & 17 Vict. c. 59, which protects a banker paying on a forged indorsement" (c).

Provisions of 39 & 40 Vict. c. 81.

In consequence of this decision of *Smith v. Union Bank of London* an Act has however been passed (39 & 40 Vict. c. 81), which entirely repeals the 21 & 22 Vict. c. 79, and deals with the subject of crossed

cheques more explicitly. By this Act a cheque may be crossed generally by putting across it two transverse lines with or without the words "and Company" or any abbreviation thereof, or it may be crossed specially by writing across it the name of a banker, and it may in either case be so crossed with the words "not negotiable" (*d*). Any lawful holder may cross a cheque (*e*). Where a cheque is crossed generally the banker on whom it is drawn must only pay it to a banker, and where crossed specially, then only to the particular banker or his agent, and if so paid, then the banker is protected by the payment, as also is the drawer if the cheque came to the hands of the payee, but if the banker pays the cheque otherwise than according to the crossing, then he is liable to the true owner for any loss sustained owing to the cheque having been so paid. In the case of any alteration or obliteration in the crossing the banker is not liable if the alteration or obliteration is not apparent (*f*).

With regard to the crossing of a cheque "not negotiable," it is provided (*g*) that a person taking a Crossing cheque not negotiable. cheque so crossed shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had. But a banker who has in good faith and without negligence received payment for a customer of a cheque crossed generally or specially to his bank, shall not, in case the title to the cheque proves defective, incur any liability to the true owner of the cheque by reason only of having received such payment.

(*d*) 39 & 40 Vict. c. 81, s. 4.

(*e*) Sect. 5.

(*f*) Sects. 7-11.

(*g*) Sect. 12.

CHAPTER VI.

OF SOME PARTICULAR CONTRACTS IRRESPECTIVE OF ANY
DISABILITY OF THE CONTRACTING PARTIES.

Matters con-
sidered in
this chapter.

UNDER this heading it is proposed to consider shortly contracts as to ships, insurance, patents, copyrights, and trade-marks; contracts with legal practitioners, medical men, dentists, witnesses, corporations, companies, and institutions; and contracts in the relation of master and servant.

I. Ships.

Merchant
Shipping Act
1854.

How a ship
or share
therein trans-
ferred.

The statute containing provisions as to the registration, ownership, and generally as to merchant shipping, is the Merchant Shipping Act, 1854 (*h*). One most important provision in that statute has been already noticed (*i*), viz., that a registered ship, or any share therein, must be transferred by bill of sale, under seal, in the form given therein, and attested by a witness, and registered by the registrar of the port at which the ship is registered (*k*); and this registration is of great importance, for in the case of several mortgages, they will have priority, not according to the date of execution, but according to the date of registration (*l*). On the discharge of a mortgage, satisfaction thereof has to be entered on the registry (*m*).

As to owner-
ship.

As to ownership in a British ship, it is considered as

(*h*) 17 & 18 Vict. c. 104, amended by 18 & 19 Vict. c. 91; 25 & 26 Vict. c. 63; 30 & 31 Vict. c. 124; 31 & 32 Vict. c. 129; and 32 & 33 Vict. c. 11.

(*i*) *Ante*, p. 38.

(*k*) 17 & 18 Vict. c. 104, ss. 55, 57. This transfer is exempted from stamp duty, as also are all agreements between masters of ships and seamen, if made in the proper form, 17 & 18 Vict. c. 104, s. 91.

(*l*) 17 & 18 Vict. c. 104, s. 69.

(*m*) Sect 68.

being divided into sixty-four equal parts, and persons may hold one or more shares, so only that the total number of registered holders does not exceed thirty-two; but five or less persons may register as joint owners of one or more shares, and as such be considered as one person (*n*). Ships, to have the privileges of British vessels, must be duly registered, and a certificate of the registry is given; and certificates may also be given by the registrar of ships, authorizing the same to be disposed of or mortgaged out of the United Kingdom (*o*).

The conduct of a ship during its voyage is intrusted to a person called the master, and he is invested with a power to do everything necessary to bring the voyage to a successful termination. If it becomes necessary to sell or hypothecate the ship, the master should, if he has the opportunity, obtain the owner's consent thereto; but if he is at a distant English port, or at a foreign port where the owner has no agent, and immediate payments are required, he has power to borrow money on the owner's credit, or even to sell or hypothecate the ship and cargo; and if the cargo is dealt with, the owner must indemnify the merchant, who will have a right either to take what his goods actually fetched, or what they would have fetched had they been brought to their destination (*p*).

Power of
master of ship
during voyage
to sell or
hypothecate.

It must necessarily be that the master of a ship has an unlimited discretion how to act in times of peril during the voyage, and it may be sometimes necessary for the safety of all to incur some loss, *e.g.*, by jettison, which is the throwing of goods overboard, which sink and are lost; in such cases it would be manifestly unfair that the particular owner should bear the whole loss of what has been done, as much for others' benefit as his own, perhaps more, and the loss is therefore

Master has
unlimited
discretion.

Jettison.

(*n*) 17 & 18 Vict. c. 104, s. 37.

(*o*) Ibid. ss. 19, 76-83, 102.

(*p*) Smith's Mercantile Law 303, 307; *Gunn v. Roberts*, L. R. 9 C. P. 331.

General and
particular
average.

rateably adjusted between all owners, which adjustment is called general average. As distinguished from this, particular average is sometimes spoken of, which simply arises when some particular injury is done, by accident or otherwise, not voluntarily, for the benefit of all; and here no contribution to the loss is made, but it has wholly to be borne by the person to whom the injured property belongs (*q*).

Salvage.

When some special and extraordinary assistance is rendered, whereby a ship, the persons on it, or its cargo are saved, the persons rendering such successful assistance, who are called salvors, are entitled to a compensation, which is called salvage (*r*). As to the persons who may become entitled to salvage, it may be particularly noticed that, though seamen of an abandoned wreck may be, yet passengers may not be (*s*); and with reference to the salvage itself, it is only allowed in the case of success; and the practice is never to allow more than a moiety for salvage (*t*). In the case of a collision between two ships, the rule in the Court of Admiralty has always been that where both ships are in fault the damage shall be borne in this way: the loss sustained by the two vessels is added together and divided between them (*u*), and the Judicature Act, 1873 (*x*), specially provides that this rule is still to continue.

Rule as to
damages in
the case of
collision
between two
ships.

Bottomry
bond.

A bottomry bond, strictly speaking, is a mortgage or pledge of a ship by the owner or agent, to secure the repayment of money lent for the use of the ship; and the conditions of it are, that if the ship is lost, the

(*q*) See the distinction between general and particular average, well stated by Lord Kenyon in *Birkeley v. Presgrave*, 1 East, 226, 227.

(*r*) See Brown's Law Dict. 319.

(*s*) The chief statutory provisions as to salvage are contained in 17 & 18 Vict. c. 104, part 8.

(*t*) *The Inca*, Sw. 370.

(*u*) See Griffith's Judicature Acts, 48.

(*x*) 36 & 37 Vict. c. 66, s. 25 (9).

lender loses his money ; but if it arrives, then, not only the ship itself is liable, but also the person of the borrower. A security given on the cargo, and not on the ship, is also now generally called a bottomry bond *Respondentia* bond. indiscriminately with the above, though formerly distinguished as a *respondentia* bond. Because of the risk the lender runs of losing his money entirely by the loss of the ship or cargo, it has always been legal, even when the usury laws were in force, to reserve any amount of interest on such a loan ; and if there are several of these securities given during a voyage, the last will generally be paid first, because, without the last, possibly the vessel might have been lost altogether (y).

The owner of a ship sometimes lets it, or some part of it, for a particular voyage, which is done by means of an agreement called a charterparty (z), and sometimes he simply agrees to carry any one's goods therein, without letting any particular part of the ship, which is done by bill of lading, which is simply a receipt for the goods and an undertaking to carry them, given by the owner or master (a). A bill of lading is a negotiable instrument, passing by indorsement the property in the goods, and the indorsee may sue thereon in his own name (b), and such an indorsement for value *bonâ fide* without notice deprives the vendor of any right of *stoppage in transitu* (c), unless the person through whom the bill of lading comes had no authority to put it in circulation (d). In respect of the carriage of goods either by means of a charterparty or a bill of lading, a certain reward is payable, which is called the freight, and for which the shipowner has a lien on the goods provided they are in his possession ; if, however, he

(y) See hereon, Smith's Mercantile Law, 413-418.

(z) See Brown's Law Dict. 59.

(a) Ibid. 46.

(b) 18 & 19 Vict. c. 111, s. 1.

(c) As to *stoppage in transitu*, see *ante*, p. 80, and case of *Lickbarrow v. Mason*, there quoted. See also as to loss of the right, 40 & 41 Vict. c. 39, s. 5.

(d) *Gurney v. Behrend*, 3 E. & B. 622.

has actually demised the whole ship he has thus parted with possession of her and her cargo, and has no lien (e).

Liability of
shipowners
for losses
to goods
during a
voyage.

In the case of loss of goods during a voyage, the question arises, What is the liability of the shipowner or person carrying the goods? At common law they are, like carriers on land (f), liable for all losses except acts of God and the king's enemies, and the charter-party or bill of lading always contains a stipulation exonerating them from such losses, and from those occasioned by accident of the seas and navigation, or by fire, as to which latter they are indeed exonerated by statute (g), which also protects them from any loss to valuable articles, unless notice thereof has been given and their value declared in writing (h). They are in addition exempted from liability for any loss or damage occasioned by the fault or incapacity of any pilot where the employment of such pilot is compulsory by law (i). They also are not liable for any robbery or embezzlement of, or making away with, or secreting certain valuable articles, such as gold, jewels, &c., happening without their privity or default (k); and they are not liable in respect of any personal injuries, either alone or with loss to ships or goods to an aggregate amount beyond £15 per ton of their ship's tonnage, nor in respect of injuries to ships or goods (whether there be in addition personal injuries or not), to an aggregate amount beyond £8 per ton of the ship's tonnage, where the loss or damage arises without their default or privity (l).

11. Insurance.

Insurance (or assurance) has been defined as a

(e) Brown's Law Dict. 170, tit. "Freight."

(f) As to whose liability, see *ante*, pp. 95--99.

(g) 17 & 18 Vict. c. 104, s. 503.

(h) *Ibid.*

(i) *Ibid.* s. 388.

(k) *Ibid.* s. 503.

(l) 25 & 26 Vict. c. 63, s. 54.

security or indemnification given in consideration of a sum of money against the risk of loss from the happening of certain events (*m*), but this definition, though explaining the primary object, cannot be considered as accurate when applied to life insurance, as will be presently explained. Insurance may be of three kinds, viz., life, fire, and marine, and as we have just considered the subject of ships, it will be convenient to consider marine insurance first, as relating thereto.

Marine insurance is generally undertaken by certain persons who are called underwriters, who subscribe the policy, each indemnifying for the amount set opposite his name. The policy is of a very ancient form (there seems no object in setting it out in a work like the present), and the insurance may be either for a particular voyage, or for a certain period, in which latter case it is called a time policy. There are generally in policies certain things expressly warranted, *e.g.*, the time of sailing, and the safety of the ship, and if there is any untruth in any of such warranties the insured cannot recover, even although the point warranted was not of any material importance. There are also three things impliedly warranted in every policy, viz., (1) That no deviation shall be made from the proper course of the voyage; (2) that the vessel is seaworthy at that time; and (3) that reasonable care shall be taken to guard against risks; and a breach of any of these three implied warranties will furnish a good defence to an action on the policy. On a loss occurring the underwriters are liable for the whole amount for which they have underwritten the policy, but if the ship or cargo is not totally destroyed, but may become so, then they are only liable for the whole amount if the owner abandons it within a reasonable time (*n*).

A contract of marine insurance is therefore simply

(*m*) Brown's Law Dict. 191.

(*n*) See hereon generally, Arnould on Marine Insurance.

Marine insurance.

Three things impliedly warranted in a marine policy.

Contracts of marine and fire insurance

are entirely
contracts of
indemnity.

But a contract
of life insur-
ance is not.

*Dalby v. India,
&c., Assurance
Company.*

To enable a
person to in-
sure another's
life he must
have an insur-
able interest in
it at the time.

and purely a contract of indemnity. So, also, is equally a contract of fire insurance; it is simply a contract in consideration of certain annual sums paid by way of premium to indemnify the person insuring against any loss that may happen from fire, and if no loss happens there can be no claim under the policy. But a contract of life insurance is totally different, for, as decided in the well-known case of *Dalby v. India and London Life Insurance Company* (o), it is a contract to pay a certain sum of money on the death of a person in consideration of the due payment of a certain annuity for his life, and is not a mere contract of indemnity; so that if one person has insured another's life, although by that other's death he may not have sustained the slightest damage, he is yet entitled to recover on the policy. A mere wager policy, however, cannot be good, for it is necessary that every person insuring another's life should have had an interest therein at the time of effecting the insurance (p), and the name of the person interested therein is to be inserted in it (q); but although that interest afterwards terminates, the policy may be kept up and recovered on. Thus if a creditor insures his debtor's life, though he is afterwards paid, yet he can recover from the insurance office. No more than the insurable interest at the time of effecting a policy can be recovered, and if several policies are effected with different offices, the insured can recover no more from the insurers, whether on one policy or many, than the amount of his original insurable interest (r).

A person may
insure his own
life.

The Act 14 Geo. 3, c. 48, which requires a person to have an insurable interest in the life he insures, does

(o) 15 C. B. 365; overruling *Godsall v. Boldero*, 9 East, 72.

(p) 14 Geo. 3, c. 48, s. 1. A like provision is made as to marine insurance by 19 Geo. 2, c. 37, which however does not apply to foreign ships, so that a wager policy as to them is good.

(q) 14 Geo. 3, c. 48, s. 2.

(r) *Hebdon v. West*, 3 B. & S. 579.

not at all prevent persons insuring their own lives, and though a husband, parent, or child, has not (unless he or she has some interest in property dependent on his, her, or their life) an insurable interest in the lives of a wife, child, or parent, yet a wife has an insurable interest in her husband's life (s). By the Married Women's Property Act, 1870 (t), it is provided that a married woman may effect a policy of insurance upon her own life, or the life of her husband for her separate use; and a policy of insurance by a married man on his own life, *if so expressed on its face*, may enure as a trust for the benefit of his wife and children or any of them, and as a trust not be subject to the control of the husband or his creditors; but if it has been effected for the purpose of defrauding creditors they are entitled to receive out of the sum secured an amount equal to the premiums paid.

A wife may insure her husband's life. Provision of 33 & 34 Vict. c. 94, hereon.

In effecting any policy of insurance, whether life, fire, or marine, it is material that there should be no concealment on the part of the person effecting the insurance. Concealment in the law of insurance has been defined, as "the suppression of a material fact within the knowledge of one of the parties which the other has not the means of knowing, or is not presumed to know" (u). The maxim of *caveat emptor* (x) does not apply to the contract of insurance, for the person effecting an insurance must state everything, not what he believes to be, but which is in fact material in the matter of the insurance; and if anything material, or which might operate to influence the rate of premium, is withheld, it will vitiate the policy (y).

There must be no concealment in effecting a policy.

Irrespective of any condition in a policy of life in-

Effect of suicide on a life policy.

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- (s) *Reed v. Royal Exchange Co.*, Peake Add. Ca. 70.
 (t) 33 & 34 Vict. c. 93, s. 10.
 (u) Arnould on Marine Insurance, 545.
 (x) As to which, see *ante*, p. 85.
 (y) See Bunyon on Life Assurance, 29; and see also *Carter v. Boehm*, 1 S. L. C. 550, and notes.

surance, on principles of public policy, if a person who has effected a policy of insurance on his own life, afterwards dies by the hands of justice, or commits suicide, unless, in the latter case, he was insane, and not accountable for his acts, the policy is vitiated, and his representatives cannot recover the amount thereof. But in addition to this it is the universal practice of insurance companies to insert in their policies conditions vitiating them on such events, and such words may be made use of as to make it of no difference in the case of death by a person's own hand, whether he was sane or insane at the time. It is important, however, to note, that in the absence of any condition on the point, the rule of the common law is, that whether the amount of the policy can be recovered depends on the question of whether or not the person was at the time responsible for his own acts (*z*).

That life and marine policies may now be assigned, has been previously noticed (*a*).

III. Patents.

Statute of
Monopolies

Term for
which a patent
may now
be granted.

A patent may be defined as a grant from the Crown by letters-patent, of the exclusive privilege of making, using, exercising, and vending, some new invention (*b*). Anciently, the prerogative that was vested in the Crown of granting such an exclusive right was much abused, and in consequence an Act was passed known as the Statute of Monopolies (*c*), whereby the granting of such monopolies was declared illegal, with certain exceptions; and by force of this and subsequent statutes, the law now is that a patent may be granted in respect of a new manufacture for a period of fourteen years; and, if advisable, that term may be prolonged for a further period of seven or fourteen years (*d*). The in-

(*z*) See hereon, Bunyon on Life Assurance, 70-79.

(*a*) See *ante*, pp. 123, 124; 30 & 31 Vict. c. 144, and 31 & 32 Vict. c. 86.

(*b*) Williams' Personal Property, 267.

(*c*) 21 Jac. 1, c. 3.

(*d*) 5 & 6 Wm. 4, c. 83, s. 4, amended by 2 & 3 Vict. c. 67, and 7 & 8 Vict. c. 69, ss. 2, 4.

ventor has to file a specification, describing accurately the nature of his invention, and to pay certain stamp duties; and by the Patent Law Amendment Act, 1852 (*e*), a register of patents has to be kept, which is open to inspection by the public on payment of a certain fee. A patent is assignable, and though the assignment is usually by deed, it does not seem necessary that it should be (*f*), and all assignments of patents have to be registered. A register of patents has to be kept.

For the infringement of his patent, the patentee has a remedy both by an action for damages and also for an injunction to restrain the further infringement; and in any action for an injunction the Court has power to award damages either in substitution for or addition to the injunction (*g*).

Copyright is defined as the sole and exclusive liberty of multiplying copies of an original work or composition, which exists in its author or his assignees (*h*). By the Copyright Act (*i*), it is provided that this right shall exist for the natural life of the author, and seven years from his decease, or for an entire term of forty-two years, whichever is the longer. Besides copyright in books, copyright exists for various terms in music, engravings, photographs, and various ornamental and useful designs (*k*). If an article is written for such a work as an encyclopædia, and paid for by the proprietor, the copyright will be in him; but after a period of twenty-eight years, the right of publishing such article will revert back to the author for the remainder of the period for which copyright is allowed (*l*). IV. Copyright.
Term for which copyright exists.

The right of property in copyright must be regis-

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- (*e*) 15 & 16 Vict. c. 83, s. 39.
 - (*f*) Williams' Personal Property, 276.
 - (*g*) 21 & 22 Vict. c. 27, ss. 2-6.
 - (*h*) Brown's Law Dict. 92.
 - (*i*) 5 & 6 Vict. c. 45, s. 3.
 - (*k*) See Williams' Personal Property, 278.
 - (*l*) 5 & 6 Vict. c. 45, s. 18.

Copyright
assignable
by a mere
entry in the
register.

tered at Stationers' Hall, and the same is afterwards assignable by an entry there of the transfer in the form given by the Act, and the registry is open to inspection on payment of a small fee (*m*). For the infringement of his copyright, the same remedies are open to the author as before mentioned in the case of a patentee (*n*).

V. Trade-
marks.

There may be
a qualified
property in a
trade-mark.

A trade-mark may be defined as some particular mark or signification adopted by a trader to identify certain goods. It is frequently said that there cannot be any property in a trade-mark, but it would appear to have been always more correct to say that there may be a certain qualified kind of property in it, provided it has been used by the trader as his trade-mark and become generally known to the trade as such (*o*); and now since the Trade-marks Registration Act, 1875, there can undoubtedly be property in a trade-mark. For the infringement of a trade-mark the same remedies are open to the proprietor of it as are open to a patentee for infringement of his patent, or to an author for infringement of his copyright, *i.e.*, to maintain an action for damages, and also for an injunction to prevent the further infringement (*p*).

What it was
formerly
necessary to
prove in an
action for
infringement
of a trade-
mark.

Trade-marks
Registration
Act, 1875.
Sec. 1.

Until lately, to enable a person to maintain an action for the infringement of a trade-mark all that it was necessary for him to prove was his user of it, that it had become well known in the trade as his trade-mark, and that the defendant had unlawfully adopted or in some way infringed it; but by the Trade-marks Registration Act, 1875 (*q*), it has been provided that a registry of trade-marks as defined by that Act, and of the proprietors thereof, shall be established under the superintendence of the Commissioner of Patents: and that from

(*m*) 5 & 6 Vict. c. 45, ss. 11, 19, 20.

(*n*) *Ante*, p. 159.

(*o*) *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. of L. Cas. 523.

(*p*) See generally as to infringement of patents, copyright, and trade-marks, Snell's Principles of Equity, 572-584.

(*q*) 38 & 39 Vict. c. 91.

and after the 1st of July, 1876, a person shall not be entitled to institute any proceeding to prevent the infringement of any trade-mark as defined by this Act, until such trade-mark is registered in pursuance of this Act (r); that a trade-mark must be registered as Sect. 2. belonging to particular goods or classes of goods, and when registered shall be assigned and transmitted only in connection with the goodwill of the business concerned in such particular goods or classes of goods, and shall be determinable with such goodwill, but subject as aforesaid, *registration of a trade-mark shall be deemed to be equivalent to public use of such mark* (s); and that Sect. 3. the registration of a person as first proprietor of a trade-mark shall be *primâ facie* evidence of his right to the exclusive use of such trade-mark, and shall, after the expiration of five years from the date of such registration, be deemed conclusive evidence of his right to the exclusive use of such trade-mark, subject to the provisions of this Act as to its connection with the goodwill of a business" (t). No trade-mark of a nature Sect. 6. similar to one already registered, or very nearly resembling the same, is to be registered without special leave of the Court, in respect of the same goods or class of goods (u).

What it is necessary, therefore, now in an action for the infringement of a trade-mark for the plaintiff to prove is, that the trade-mark is duly registered (x), and that it has been infringed by the defendant; and this is only at first *primâ facie* evidence, and, if contradicted, the matters formerly necessary to have been proved will have still to be shewn, but proof of the registration alone will, after five years from its taking place, be conclusive evidence of the plaintiff's right to the trade-mark.

(r) 38 & 39 Vict. c. 91, s. 1.

(s) Sect. 2.

(t) Sect. 3.

(u) Sect. 6.

(x) And of this the certificate of the registrar is sufficient evidence (sect. 8).

Warranty implied of goods sold with a trade-mark on them.

As has before been noticed (*y*), it is provided by statute (*z*), that if any article is sold with a trade-mark thereon, a warranty is implied that the same is genuine and true, unless the contrary is expressed in some writing signed by or on behalf of the vendor, and delivered to, and accepted by, the vendee.

VI. Legal practitioners.

Barristers cannot recover their fees, and are not liable for negligence.

Legal practitioners may be either barristers, special pleaders not at the bar, certified conveyancers, or solicitors. The three latter may recover their fees, but the first may not, their acting being deemed of a voluntary nature, and their fees merely in the light of honorary payments; and it follows from this, that no action lies against them for negligence or unskilfulness.

Position of solicitor and client.

Solicitor must deliver a signed bill a month before suing, except leave obtained.

In the absence of an express contract, the agreement of a client with his solicitor is to pay him for his services the ordinary and usual charges, which are regulated chiefly by the time occupied in attendances, and by the length of documents; and beyond this, in particular cases, any special skill or trouble may be taken into consideration (*a*). The client is entitled to the personal advice of the solicitor, though if a clerk sees the client and has continual opportunities of conferring with his principal, this is sufficient (*b*). To entitle a solicitor to recover his bill of costs he must have had a certificate to practise during the time the work was done, and it is also necessary for him to deliver a signed bill, or a bill with a letter signed, a calendar month before bringing the action (*c*), unless he obtain leave to commence the action before, which he may do on the ground that the client is about to leave England,

(*y*) See *ante*, p. 85.

(*z*) 25 & 26 Vict. c. 88, ss. 19, 20.

(*a*) See 33 & 34 Vict. c. 28, s. 18.

(*b*) *Hopkinson v. Smith*, 1 Bing. 13.

(*c*) 6 & 7 Vict. c. 73, s. 37. And in this bill he must state the items; it is not sufficient to put a gross sum.

become bankrupt, liquidate, compound with his creditors, or do any other act that may be prejudicial to him the solicitor (*d*); in any action, also, brought by a client against his solicitor the latter may set off the amount of his costs, though the month has not expired, and even though they have not been delivered, provided he delivers them before trial (*e*). A solicitor may now also enter into a contract with his client for remuneration in some way other than by his ordinary charges (*e.g.*, by commission), but such agreement must be in writing, and if in respect of any action, must be submitted to a taxing-master for approval before anything can be received under it; any agreement for payment, however, only in the case of success is void, and any stipulation that the solicitor is not to be liable for negligence is also void (*f*). A solicitor could always take a security from his client for costs already incurred, and he can now also do so for costs to be incurred (*g*). A solicitor may now enter into a contract for remuneration by commission or otherwise.

The Court or a judge before whom any action, matter, or other proceeding has been heard has power to order the solicitor's costs to be made a charge on the property recovered or preserved by the solicitor's acts (*h*). Solicitor's costs may be charged on property recovered.

It is the duty of a solicitor to conduct his client's case with ordinary skill and due expedition to its conclusion; and if, having commenced any proceedings, he refuses to continue them, he will not be entitled to his costs, unless specially justified by circumstances in so doing, *e.g.*, if the client denies that he is liable to pay the costs already incurred (*i*), or if on reasonable notice the client omits to furnish him with money to meet costs out of pocket (*k*),—in either of these cases the solicitor may discontinue and bring an action for his costs The duty of a solicitor. When he may discontinue proceedings he has commenced.

(*d*) 38 & 39 Vict. c. 79.

(*e*) *Brown v. Tibbits*, 31 L. J. (C.P.) 206.

(*f*) 33 & 34 Vict. c. 28, ss. 4–15.

(*g*) *Ibid.* s. 16.

(*h*) 23 & 24 Vict. c. 127, s. 28.

(*i*) *Hawks v. Cottrell*, 3 H. & N. 243.

(*k*) *Wadsworth v. Marshall*, 2 C. & J. 665.

already incurred. If a solicitor, in the course of his acting, does not conduct his client's business with ordinary diligence, but is guilty of some *gross* default, negligence, or ignorance, whereby his client is injured, he is liable to an action (*l*), but he is not liable for a mistake on some doubtful point of law (*m*). A solicitor employing an agent is liable to his client for that agent's negligence.

When negligence of solicitor may be set up as a defence to an action for his costs.

With regard to a solicitor's negligence, the rule has been long settled that if he brings an action to recover the amount of his bill, his negligence cannot be set up as a defence to the action, unless the negligence has been of some such extreme kind that the client has obtained, and can obtain, no benefit whatever from his services; and that where the client has derived, or may derive, some benefit from what the solicitor has done, although a great part of the benefit he ought to have derived may have been lost to him, yet this will merely go to reduce the amount of the demand, and a cross-action must be brought by the client for the negligence complained of (*n*). This rule is, however, now no longer correct, for by the Judicature Act, 1875, it is enacted, as hereafter noticed (*o*), that anything may be set off by way of counter-claim, even although sounding in damages (*p*).

Position of a solicitor dealing with his client.

A solicitor is not absolutely incapable of buying from, or selling to, or otherwise contracting with his client; but if he does so, it is incumbent on him, on the contract being called in question, to shew either that the contract was perfectly fair, or that the client had sepa-

(*l*) See *Godfrey v. Dalton*, 6 Bing. 460, 467.

(*m*) *Kemp v. Burt*, 4 B. & A. 424.

(*n*) Chitty on Contracts, 518, 519.

(*o*) 38 & 39 Vict. c. 77, Order XIX. r. 3, *post*, p. 217.

(*p*) "Since the commencement of the new Acts counter-claims of almost every kind have been allowed:" Griffith's Jud. Acts, 254, where see several cases referred to. As to what will amount to negligence in a solicitor, see Chitty on Contracts, 521-524.

rate and independent advice, and if he cannot shew this, it will be set aside (*q*).

Although a witness who is subpoenaed to attend a trial has a claim for his expenses, and when called to give an opinion and not to speak to a fact for his loss of time (*r*), his claim is not against the solicitor in the action, but against the party on whose behalf he is subpoenaed (*s*). The remedy of a sheriff's bailiff, however, who executes process in an action, is not against the client, but against the solicitor (*t*).

Witness's claim for expenses is not against the solicitor.

But a bailiff's is.

Medical men may be either physicians, surgeons, apothecaries, or chemists and druggists. As to the latter, their duty is simply to prepare, dispense, and sell medicines, and they cannot recover for advice. As to the three former they can recover their fees, provided they are duly registered under the Medical Act (*u*), and provided also, as to physicians, that they are not prohibited by the bye-laws of any college of physicians from so doing (*x*). An ordinary practitioner, however, only registered under the Medical Act, and not holding any other qualification, cannot recover for medicines and attendance except in a surgical case, and if a medical man is guilty of such a want of reasonable care or skill that his patient receives no benefit, he cannot recover his fees, and he is liable to an action by the patient for negligence, even though he was not called in by such patient, or was not to be remunerated by him (*y*), and any negligence might be set-off against him by way of counter-claim in an action brought by him for his fees (*z*).

VII. Medical men and dentists.

21 & 22 Vict. c. 90.

(*q*) The subject of the dealings of a solicitor with his client belongs more especially to equity, and the student is referred, for further information thereon, to Snell's Principles of Equity, 471.

(*r*) See *post*, p. 166.

(*s*) *Lee v. Everest*, 2 H. & N. 285.

(*t*) *Brewer v. Jones*, 10 Ex. 655.

(*u*) 21 & 22 Vict. c. 90, amended by 23 Vict. c. 7.

(*x*) Chitty on Contracts, 530, 531.

(*y*) See generally as to torts arising peculiarly from negligence, *post*, part ii. ch. vi.

(*z*) 38 & 39 Vict. c. 77, Order XIX. r. 3, *post*, p. 217.

Dentists' Act,
1878.

With regard to dentists, it is now provided by the Dentists' Act 1878 (*a*), that from the 1st August 1879 a person shall not be entitled to recover any fee or charge in respect of dentistry unless registered under that Act, or unless he is a duly qualified medical practitioner (*b*); and that no person shall be entitled to use the name or title of "dentist" or "dental practitioner," or any description implying that he is registered under this Act, or that he is a person specially entitled to practise dentistry, under a fine of not exceeding £20, unless he is duly registered (*c*). Prior to this Act there was no provision of this character as to dentists, who are by force of it now placed in much the same position as medical men.

VIII. Wit-
nesses.

Every person subpoenaed as a witness is entitled to be paid a reasonable sum for his expenses of going to, staying at, and returning from the trial, and this sum must be paid or tendered him at the time of his being served with his subpoena, otherwise he is not bound to attend. If a witness lives within the bills of mortality it is sufficient to give him a nominal sum with his subpoena, usually one shilling (*d*). If a witness who is not paid a proper sum for his expenses, yet chooses to attend, he is justified in refusing to be sworn until his expenses have been paid (*e*).

When a
witness is
entitled to be
paid for loss
of time.

But though a witness is always entitled to his expenses, yet he is not entitled to be paid for his loss of time unless he is a witness called, not to give evidence upon some matter of fact, but of opinion, *e.g.*, an expert, and then he is so entitled (*f*).

Service of a subpoena on a witness must be personal, and the remedy against a witness for not attending on

(*a*) 41 & 42 Vict. c. 33.

(*b*) Sect. 5.

(*c*) Sect. 3.

(*d*) Chitty on Contracts, 542.

(*e*) Ibid.

(*f*) See *Webb v. Page*, 1 C. & R. 23; *Lee v. Everest*, 2 H. & N. 285.

his subpoena is either by attachment for contempt of Court in not obeying the subpoena, which is a process of the Court, or by an action for damages (*g*).

A corporation is some legal body always known by the same name, and perpetually preserving its identity, and it may be either a corporation sole, that is, composed of one person, *e.g.*, a bishop; or a corporation aggregate, that is, one composed of many persons, *e.g.*, some company incorporated by Act of Parliament (*h*). Corporations aggregate may be created either by Act of Parliament, charter, or letters patent, and the great peculiarity as to their contracts is that, generally speaking, they must be under their common seal. To this rule there are, however, exceptions, which may chiefly be stated to be contracts comprising some matter of everyday occurrence, or of such a nature as to be actually necessary, these being valid, though not under the common seal (*i*); thus, in the case just cited, it was held that the guardians of a poor-law union who had given orders to a tradesman to supply and put up water-closets in the union workhouse, which he had accordingly done, could not afterwards defend themselves in an action brought for the price by shewing that there was no contract under seal, as, for the purposes for which the guardians were made a corporation, it was necessary that they should provide such articles.

IX. Corporations, companies and institutions.

Companies may be either unlimited or limited, and now any company consisting of seven or more persons may, and if more than twenty persons must, be registered (*k*). An unlimited company is simply a combina-

Differences between limited and unlimited companies.

(*g*) See also as to witnesses, *post*, part 3, ch. ii., on Evidence.

(*h*) Williams' Personal Property, 236, 237.

(*i*) *Clarks v. Cuckfield Union*, 21 L. J. (Q.B.) 349.

(*k*) 25 & 26 Vict. c. 89, ss. 4, 6. And it has been recently decided that where there is any combination of more than twenty persons having for their object the acquisition of gain, the assistance of the Court cannot be had in any way, so that a trust deed entered into amongst such persons cannot be enforced: *Sykes v. Beadon*, L. R. 11 Ch. D. 170.

tion of several persons together for some business, and the members stand in the position of ordinary partners. and liable to an unlimited degree to all the debts of the partnership, and the ordinary partnership rules will generally apply to them (*l*). A company may, however, be limited if duly registered as such (*m*), and the members are then only liable to the extent of their different shares; so that any person contracting with such a company must only look for payment to the assets of the company.

Contracts by
registered
companies.

Any contracts made by a registered company need only be under such company's seal when the same would, if made by a private person, require a seal; where, if made by a private person, writing would be necessary, signature by some person authorized by the company is sufficient; and where no writing would be necessary if made by a private person, the contract may be made by parol by some person authorized by the company (*n*). Shares in a registered company may be transferred by deed duly registered at the company's office, or, in the case of such a company limited by shares, when shares are fully paid up, by simple delivery of share warrants (*o*).

Liability in
respect of
contracts on
behalf of
charities and
institutions
generally.

With regard to contracts made with persons acting on behalf of institutions and associations, such as charities, clubs, and the like, the rule is that the persons making, or authorizing the making of, the contract are the persons liable, unless, indeed, the other party has specially agreed that he will look for payment only to the assets of the institution. And this rule applies to all miscellaneous undertakings, it

(*l*) For which see *ante*, p. 114–123.

(*m*) 25 & 26 Vict. c. 89.

(*n*) 30 & 31 Vict. c. 131, s. 37.

(*o*) *Ibid.* ss. 27–33. The subject of companies has now attained such general importance that it is well worthy of some separate study by every student. The student may gain a fair elementary knowledge on the subject from the perusal of a little work lately published, viz., "Eustace Smith's Summary of the Law of Companies."

being always a question, when a person disputes his liability, whether he in any way authorized what has been done so as to make himself liable. Thus, if a person becomes one of a committee of direction of any such undertaking or institution, this will be evidence to shew that he has made himself liable for goods supplied for its purposes, even although he himself did not give, or assist in giving, the particular order in question (*p*). The mere fact, however, of a person being a member of a committee of management will not always in itself serve to render him liable; it is only evidence of his having authorized the making of the contract. Thus, where wine for a club had been ordered by the house steward of a club according to the directions of the committee of management, in an action brought against two members of that committee, it was held that it was a question for the jury whether the defendants had authorized the steward to order the wine in question (*q*).

Contracts in the relation of master and servant X. Master and servant. may be conveniently considered under three heads, viz.:—1. As to the hiring. 2. As to the power of the servant, and the relation between the parties during the service; and 3. As to the determination of the service.

Firstly, then, as to the hiring.—There may be an express contract for the hiring of a servant, and when As to the hiring. there is, it may be either in writing or by parol, unless it is for a hiring for a period beyond a year, in which case writing is by the Statute of Frauds necessary (*r*) and it may perhaps be considered doubtful whether a contract for hiring and services for life does not require to be by deed (*s*). In every express contract

(*p*) See Chitty on Contracts, 220–223.

(*q*) *Todd v. Emly*, 8 M. & W. 505.

(*r*) 29 Car. 2, c. 3, s. 4, *ante*, pp. 39, 43–45.

(*s*) See notes to *Mitchell v. Reynolds*, 1 S. L. C. 417.

for hiring, its duration, and the wages in respect of the hiring, should be stated, but if there is no express contract, but simply an entering into service, it is called a general hiring, which has been decided to be for different terms according to the nature of the service (as will be next noticed), but in respect of which hiring it is always presumed, unless the contrary appears, that reasonable wages are to be paid (*t*).

Different kinds
of servants.

Effect of
general
hiring.

Persons occupying the legal position of servants may be classified as clerks, domestic or menial servants, and servants who are neither in the position of clerks nor domestic nor menial servants. A general hiring of a clerk is a yearly hiring determinable by three months' notice, or an equivalent three months' wages (*u*); a general hiring of a domestic or menial servant is also a yearly hiring, but determinable by a month's notice, or an equivalent month's wages (*x*); and a general hiring of other kinds of servants, though it will be taken primarily as a hiring for a year (*y*), must depend more especially upon the circumstances of each particular case, as, indeed, it must, to a certain extent, in all cases, so that the fact of a servant's wages being payable at longer or shorter periods, as the case may be, may alter the presumption as to the hiring and the length of notice required, as also may any usage or custom in any particular trade or business. Although a general hiring of a servant may therefore be construed as a hiring for a year, and so on from year to year, yet, as it need not necessarily extend beyond the year, it is valid though not in writing (*z*).

As to the
power of the
servant, and
the relation
between
master and
servant.

Secondly, as to the power of the servant, and the re-

(*t*) Chitty on Contracts, 531.

(*u*) *Fairman v. Oakford*, 5 H. & N. 635.

(*x*) *Fawcett v. Cash*, 5 B. & Ad. 904. The housekeeper of a large hotel is not a menial servant, and cannot be dismissed on a month's notice in the absence of express agreement: *Lawler v. Linden*, 10 Irish Rep. C. L. 188.

(*y*) *Bayley v. Rimmell*, 1 M. & W. 506.

(*z*) *Beeston v. Collyer*, 4 Bing. 309. See as to contracts not to be performed within a year, *ante*, pp. 43-45.

lation between the parties during the service.—It will be at once seen that a person by entering into another's service becomes that other's agent for certain purposes, and that, therefore, the ordinary principles of agency apply, and answer the question of his power to bind his master by his contracts. These principles of agency have already been considered, and the very great difference in the powers of a general and a special agent pointed out (a); and it will follow from that difference, that the power of a servant to bind his master must depend on whether he is merely a special agent, appointed simply now and then to do some particular act, or whether he is a general agent, having a wide power given him by his master to do all acts of a certain nature. If he is of the former kind, then any contract which he makes can only bind his master when strictly in conformity with his master's orders; but if he is of the latter kind, then any contract he makes will bind his master, even though it goes beyond his master's orders in the particular case, if it is within the scope of his ordinary authority. To exemplify this by an instance: Illustration. If a master simply once directs his servant to go to a shop and purchase certain goods, giving him the money to pay for them, and the servant misapplies the money, and gets the goods on credit, here the master will not be liable to pay for them, for the servant was but a special agent, and it was the duty of the shopkeeper to inquire into the extent of his authority, and the getting of the goods on credit was beyond his authority; but if the master is in the habit of sending his servant to buy goods on credit, though in this instance he gives him the money to pay for them, and, instead of paying, the servant misapplies the money and gets them on credit, the master will be liable to pay for them, because the servant was a general agent, and his act comes within the scope of his ordinary authority.

A master is liable for his servant's torts when com- As to torts committed by a servant.

(a) See *ante*, pp. 106, 107.

mitted by the servant acting in the course of his ordinary employment and duty, but he is not liable criminally for his servant's unauthorized act (b).

Servant entitled to be paid wages though disabled through temporary illness.

Master not bound to provide medical attendance for his servant.

A servant is entitled to be paid wages during a time he was disabled from service by illness (c), and the relation between an ordinary master and servant (it is otherwise as to an apprentice), does not make it obligatory on a master to provide medical attendance or medicines for his servant; but if he sends for a medical practitioner for his servant whilst under his roof, he is liable, and he cannot deduct from the servant's wages any expenses incurred thereby, unless it was specially so agreed (d).

Master not bound to indemnify servant against injuries.

There is no implied contract by a master to indemnify his servant against any injury happening in the course of his employment, or even not to expose his servant to any extraordinary risks (e); but there is a duty cast on him to make use of proper tackle and machinery in his business, and to employ duly competent co-servants, and if any injury arises to the servant through the non-observance of this duty, the master will be liable (f).

As to the determination of the service.

Thirdly, as to the determination of the service.—The general way in which this happens, is by notice either by the master or the servant, the length of which notice varies according to the contract for hiring or the nature of the service (g)

When master may discharge servant without notice.

In giving the notice, it is not necessary to allege any

(b) See hereon, *post*, part 2, ch. 1, p. 249.

(c) *Cukson v. Stones*, 1 E. & E. 248.

(d) See Chitty on Contracts, 537; and the principle that a master is not bound to provide medical attendance or medicines for his servant is the same, even although the servant's illness has arisen through an accident incurred in performing his duties as servant, unless indeed it arose in such a way that the master could be held liable for it, as to which see *post*, pp. 342, 343.

(e) *Riley v. Bazendale*, 6 H. & N. 445.

(f) *Wilson v. Merry*, L. R. 1 H. L. Sc. 326, *post*, pp. 342, 343.

(g) *Ante*, p. 170.

reason for it; and in the following cases the master will be justified in putting an end to the contract of service without any notice:—

1. When the servant unlawfully absents himself from his work.

2. If he proves to be incompetent to perform any particular service which he had agreed to render.

3. If he refuses or neglects to obey his master's reasonable orders; and

4. If he is guilty of any gross moral misconduct, or of habitual neglect in the performance of his duties.

And in these cases the servant will only be entitled to wages already accrued due, so that if his wages are payable monthly, and he is discharged in the middle of a month, he forfeits his right to such wages (*h*).

The death of either master or servant will operate to Death. dissolve the contract of service (*i*).

A master is not bound to give his servant a character, but if he does so, he must give what he believes to be a true one; if he wilfully gives a false character, he will be liable to an action for libel or slander; but if he believes it to be true, and makes it honestly and fairly, without exaggeration, it comes within the designation of a privileged communication, and he is not liable (*k*).

Master's liability as to giving a character to his servant.

Many important points in the relation of master and servant belong to the second division of this work, viz., "Torts," and are there considered (*l*).

(*h*) Chitty on Contracts, 534, 535. As to the measure of damages in an action by a servant for wrongful dismissal, see *post*, p. 380.

(*i*) *Farrow v. Wilson*, L. R. 4 C. P. 744.

(*k*) See *post*, p. 315.

(*l*) See *post*, part 2, particularly ch. 6, "Of Torts arising peculiarly from Negligence."

CHAPTER VII.

OF CONTRACTS WITH PERSONS UNDER SOME DISABILITY.

In this chapter will be considered the position of the following parties as to their contracts : Infants, married women, persons of unsound mind, intoxicated persons, persons under duress, and aliens.

I. Infants.

An infant in the eyes of the law is a person under the age of twenty-one years, and at that period (which is the same in the French and generally in the American law), he or she is said to attain majority ; and for his torts (*m*) and crimes an infant may be liable ; but for his contracts, as a general rule, he is not liable, unless the contract is for necessities. The law as to infants' liability on their contracts has lately been very much altered by the Infants' Relief Act, 1874 (*n*), but to properly understand the application of that Act it will be necessary to first notice the law as it stood before its passing.

Infant is always liable on his contracts for necessities. Other contracts could formerly be ratified.

On his contracts for necessities an infant is now and always has been liable ; and with regard to his other contracts, they were not formerly actually void, but only voidable, and accordingly, from the earliest times, capable of ratification after he came of age without any new consideration (*o*) ; and it was held that any act or declaration which recognised the original contract as

(*m*) As to torts, see *post*, part 2.

(*n*) 37 & 38 Vict. c. 62.

(*o*) See Co. Lit. 2b.

binding was sufficient ratification (*p*). But by Lord Tenterden's Act (*q*) it was provided that no action should be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification were made by some writing signed by the party to be charged therewith (*r*). As to contracts not for necessities, therefore, the law, until lately, was that they might be ratified by the infant after coming of age by writing duly signed by him.

But this is no longer so, for, by the Infants' Relief Act, 1874 (*s*), it is enacted that "all contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities), and all accounts stated with infants, shall be absolutely void: provided always, that this enactment shall not invalidate any contract into which an infant may by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable" (*t*); and that "no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age, of any promise or contract made during infancy, *whether there shall or shall not be any new consideration for such promise or ratification after full age*" (*u*). The law, therefore, as to infants'

(*p*) See cases cited in Chitty on Contracts, 149.

(*q*) 9 Geo. 4, c. 14, s. 5.

(*r*) Signature by an agent was not sufficient, and 19 & 20 Vict. c. 97, s. 13, made no difference in this rule.

(*s*) 37 & 38 Vict. c. 62.

(*t*) Sect. 1. As to the latter part of this section, see note (*u*).

(*u*) Sect. 2. This Act, in making infants' contracts void, does not apply to the powers of infants in certain cases to convey lands, viz.: By the custom of gavelkind at the age of fifteen by feoffment; on marriage by

contracts at the present day is, that they are absolutely void and incapable of ratification unless for necessities, and it has been decided that the Act applies to a ratification made after its passing of a debt contracted prior to it (x).

Promise to marry by infant.

In a recent case the point was raised of the position of a person who having during infancy entered into a promise to marry, after full age recognises the promise by continuing his position as before. It was held that the Infants Relief Act, 1874, applied to this in the same way as to other cases, and that in the absence of some distinct evidence of a new promise no action could be maintained (y).

The meaning of the term "necessaries."

An infant being, however, still, as formerly, liable for necessities, it is important to properly understand the meaning of that term. It must follow, as a matter of course, that it will include all things essential for existence, and without which a person cannot reasonably be supposed to live, *e.g.*, ordinary food and clothing; but it has a much wider application than this, and many things not actually essential to existence are included under it. The rule as to what will be deemed necessities has been stated as follows: "All such articles as are purely ornamental are not necessary, and are to be rejected, because they cannot be requisite for any one; and for such matters, therefore, an infant cannot be held responsible. But if they are not strictly of this description, then the question arises whether they were bought for the necessary use of the party, *in*

the sanction of Chancery under 18 & 19 Vict. c. 43; and by the sanction of Chancery for payment of debts under 1 Wm. 4, c. 47, the latter part of section 1 providing, as is stated above, that it shall not operate to invalidate any contract into which an infant may by any existing or future statute, or by rules of common law or equity, enter, except such as are by law voidable. In the opinion of the writer also the Act makes no alteration in the rule that a lease by an infant is good if he accepts rent after he comes of age, because the accepting of rent does not operate merely as a ratification, but by way of estoppel. And see also Chitty on Contracts, 151.

(x) *Ex parte Kibble*, L. R. 10 Ch. App. 373.

(y) *Coxhead v. Mullis*, L. R. 3 C. P. Div. 439.

order to maintain himself properly in the degree, state, and station of life in which he moved; if they were, for such articles the infant may be responsible" (z).

To take an instance to exemplify this rule, it has been held that an infant is liable for the price of horses bought by him if his position warranted his keeping horses, or if riding was recommended by his medical adviser (a). To enumerate all the different cases in which things have or have not been held to be necessities would be useless, and the answer to the question of what are necessities for which an infant will be liable, to be collected from all the cases, may be shortly stated to be, that he will be liable, not merely for the bare essentials of life, but also for education, and generally for anything suitable to his rank and condition in life, and it will always be a question for the jury whether an infant is liable or not in every particular case (b). And if an infant has a wife or children, he will be liable for necessities supplied to her or them (c).

The statement that an infant is absolutely liable for necessities must, however, be taken with the following restriction, viz., that if an infant is residing under the parental roof, he cannot generally be made responsible even for necessities, for in such a case the presumption is that the credit is intended to be given to the parent, and not to the infant (d). It must not, however, from this, be taken as law, that in such a case the parent is necessarily liable for such things supplied to his child living with him, for he is not so liable, as a matter of course, it being always necessary, to render the parent

An infant is not liable for necessities if residing under the parental roof.

Nor is the parent necessarily liable.

(z) Per Parke, B., in *Peters v. Fleming*, 6 M. & W. 47; cited in Broom's Coms. 573, 574. See also as to meaning of term "necessaries," *Skrine v. Gordon*, 9 Irish Reps. C. L. 479.

(a) *Hart v. Prater*, 1 Jur. 623.

(b) See hereon, *Ryder v. Wombwell*, L. R. 4 Ex. 32; and also Chitty on Contracts, 138-144.

(c) *Turner v. Trisby*, 1 Str. 168; Chitty on Contracts, 140.

(d) Chitty on Contracts, 140, 147.

liable, to shew that he in some way, either by a precedent act or a subsequent ratification, authorized his child to contract and to bind him; for if he has in no way given any authority, he is no more liable to pay a debt contracted by his child, even for necessities, than a stranger would be. But slight evidence of the parent's authority will usually be sufficient, so that, if goods are delivered at the parent's residence, this will *primâ facie* raise a presumption of his liability (e): though, if, directly he heard of the goods or saw them, he objected to them, this would operate to rebut his liability. It might, therefore, possibly happen in such a case that a tradesman supplying goods might find himself without remedy against any one.

As to whether an infant is liable for money lent to buy necessities.

For money lent to an infant not for the purposes of buying necessities he is of course not liable, and at common law he was not liable for money lent to him even though for the purpose of buying necessities (f); but it is doubtful whether this is so now, for as the Court of Chancery on principles of equity would probably formerly have given relief in such a case, by allowing the lender to stand in the place of the person who supplied the necessities, and as by the Judicature Act, 1873 (g), the rules of equity, where different from those of law, are to prevail, probably now money lent for the purpose of buying necessities may be recovered back in any division of the High Court of Justice.

Or where he has represented himself to be of age.

The mere fact of a person having fraudulently represented himself to be of age when in fact he was an infant will not be sufficient to render him liable. Thus where an infant had obtained a lease of a furnished house on an implied representation that he was of

(e) Chitty on Contracts, 147.

(f) *Darby v. Boucher*, 1 Salk. 279.

(g) 36 & 37 Vict. c. 66, s. 25 (11).

full age it was held that although the lease must be declared void and possession ordered to be delivered up yet the infant was not liable for use and occupation (h).

An infant is not liable on a bill of exchange or promissory note to which he is a party, although it were given for necessaries; but such a bill is good as against the other parties thereto (i). He could, however, be sued on the original debt for necessaries.

Infant not liable on a bill or note, though for necessaries.

Infancy is a personal privilege, and does not affect the other contracting person's liability, so that though an infant is not liable generally to be sued on his contracts he is capable of suing, which forms one exception to the rule that mutuality is necessary to the contract (j).

Infancy is a personal privilege.

An infant's contract to marry stands on the same footing as any ordinary contract he enters into, i.e., the infant is not liable on it, but can sue in respect of it.

Infant not liable on a contract to marry.

But if the infant actually completes the contract by going through the marriage ceremony in the manner prescribed by law, then if a male and of the age of fourteen or upwards, or a female and of the age of twelve or upwards, it is absolutely binding; or if under those ages but not under the age of seven, then he or she may avoid the marriage on arriving at such ages respectively, but if either party is under the age of seven then the marriage is absolutely void.

But if marriage takes place it is generally binding.

The position of married women as to their contracts may be conveniently considered in the following order:—

II. Married women.

1. As to their contracts made before marriage.

(h) *Lemprière v. Lange*, L. R. 12 Ch. Div. 675.
 (i) *Chitty on Contracts*, 145.
 (j) *Ibid.* 151.

2. As to their contracts made after marriage, and during cohabitation ; and

3. As to their contracts made after marriage and during separation.

As to their contracts made before marriage.

Rights of husband in wife's personal property.

What is a sufficient reduction into possession.

Firstly, then, as to contracts made before marriage, and here it is apparent that there may be a benefit or a liability in respect of them, and any such benefit being an outstanding right is a chose in action. The effect of marriage upon personal property in possession is, that it operates as an absolute gift of it in law to the husband, so that from that time it is no longer her property, but his in every way (*k*) ; but with regard to mere choses in action this is not so, for to entitle the husband to them, he must reduce them into possession, and if he does this then they form part of his estate in the same way as choses in possession ; but if he does not reduce them into possession, and his wife dies, he will not then be entitled to them *jure mariti* (that is, in his capacity of husband), but only by taking out letters of administration to his wife, and thus constituting himself her legal personal representative, which makes a very great difference, for if he takes *jure mariti* he is not bound to pay her debts which may possibly exist. If the wife survives the husband, then her choses in action not having been reduced into possession survive and belong to her. To constitute a sufficient reduction into possession by the husband it is technically said that he must take some step shewing his disagreement to, and extinguishing, the interest of his wife, *e.g.*, of course the actually receiving the principal money will always so operate, though not the mere receipt of interest, and, again, the recovery of judgment in an action brought by husband and wife will be sufficient (*l*).

(*k*) Williams' Personal Property, 48.

(*l*) See hereon, Chitty on Contracts, 152-154. The subject of married women's property and the position of married women as to separate

As to the liability of the husband, at common law the rule was absolute that he was liable for all his wife's contracts and debts entered into and contracted by her before marriage, whether he had any property with her or not, but this liability ended with her death unless he took out administration to her choses in action, when he would still be liable as administrator to the extent of the assets (*m*), but the rule has now been very materially altered, as is next stated.

Liability of husband on wife's contracts made before marriage.

By the Married Women's Property Act, 1870 (*n*), it is provided that "a husband shall not by reason of any marriage which shall take place after this Act has come into operation (*o*), be liable for the debts of his wife contracted before marriage, but the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy such debts as if she had continued unmarried."

Married Women's Property Act, 1870, sect. 12.

But a very short trial of this provision shewed that as it stood it was too extensive, for it created a possible manifest injustice. It provided that the husband should never be liable; but yet in many cases the husband might have property through his wife, and it not being to the wife's separate use, the creditor had no hold on it. Supposing that a woman possessed of £1000, no separate estate, and owing several debts, married,—the consequence under this provision would be that the husband would take the £1000 by the act of marriage, and through him the wife would reap the benefit of it, and yet the creditors would not have any claim against either the husband, the wife, or the property, though manifestly in common justice they ought to be paid out of the £1000. It will be noticed

Injustice caused by this section.

estate, &c., belongs to conveyancing and equity, and the student is referred to Williams on Real Property, and Snell's Principles of Equity, and to the Married Women's Property Act, 1870.

(*m*) Chitty on Contracts, 154.

(*n*) 33 & 34 Vict. c. 93, s. 12.

(*o*) 9th of August, 1870.

however, that this provision did not apply to the liability of the husband where the marriage had taken place prior to the coming into operation of the Act (9 Aug. 1870).

Married
Women's
Property Act
Amendment
Act, 1874.

Sect. 1.

Sect. 2.

As to the
assets to the
extent of
which husband
is liable, see
note (t).

The injustice of the provision in the Married Women's Property Act, 1870, has, however, now been remedied, for, by the Married Women's Property Act Amendment Act, 1874 (*p*), it has been provided that "so much of the Married Women's Property Act, 1870, as enacts that a husband shall not be liable for the debts of his wife contracted before marriage is repealed, so far as respects marriages which shall take place after the passing of this Act (*q*); and a husband and wife married after the passing of this Act may be jointly sued for any such debt" (*r*): but "the husband shall in such action and in any action brought for damages sustained by reason of any tort committed by the wife before marriage, or by reason of the breach of any contract made by the wife before marriage, be liable for the debt or damages respectively to the extent only of the assets hereinafter specified; and, in addition to any other plea or pleas, may plead that he is not liable to pay the debt or damages in respect of any such assets as hereinafter specified; or confessing his liability to some amount, that he is not liable beyond what he confesses; and if no such plea is pleaded, the husband shall be deemed to have confessed his liability so far as assets are concerned" (*s*). The assets to the extent of which the husband is to be liable are substantially any assets he may have by or through his wife, but they are specified in the Act, and are set out below (*t*); and if

(*p*) 37 & 38 Vict. c. 50.

(*q*) 30th July, 1874.

(*r*) Sect. 1.

(*s*) Sect. 2.

(*t*) "1. The value of the personal estate in possession of the wife which shall have vested in the husband.

"2. The value of the choses in action of the wife which the husband shall have reduced into possession, or which with reasonable diligence he might have reduced into possession.

the husband, after marriage, pays any debt of his wife, or has a *bonâ fide* judgment recovered against him for any such debt, then such payment or judgment goes to reduce the amount of assets which he had with his wife, and the extent of his liability in the future (u).

The Act also goes on to provide that, "if it is not found in such action that the husband is liable in respect of any such assets, he shall have judgment for his costs of defence, whatever the result of the action may be against the wife" (w); and that "when a husband and wife are sued jointly, if by confession or otherwise it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband and wife; and as to the residue (if any) of such debt or damages, the judgment shall be a separate judgment against the wife" (x).

It will be noticed that the provisions of this Act do not apply to marriages that took place prior to its passing (30 July 1874).

Any question, therefore, as to the liability of the husband for his wife's ante-nuptial debts must depend on the date of the marriage: if it took place before the 9th of August, 1870, he is liable for them all; if

Summary as to liability of husband for wife's ante-nuptial debts.

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- "3. The value of the chattels real of the wife, which shall have vested in the husband and wife.
 - "4. The value of the rents and profits of the real estate of the wife which the husband shall have received, or with reasonable diligence might have received.
 - "5. The value of the husband's estate or interest in any property, real or personal, which the wife in contemplation of her marriage with him shall have transferred to him, or to any other person.
 - "6. The value of any property, real or personal, which the wife in contemplation of her marriage with the husband shall with his consent have transferred to any person with the view of defeating or delaying her existing creditors," sect. 5.

- (u) Sect. 5.
- (w) Sect. 3.
- (x) Sect. 4.

between that date, and the 30th of July, 1874, he is not under any liability in respect of them; and if since this latter date he is liable to the extent of the assets which he has with or through his wife.

As to contracts made during cohabitation.

Secondly, as to contracts made after marriage and during cohabitation. Marriage produces a general disability on the part of the wife to contract, so that no contract that she may make will be binding on her, and any advantage she may acquire vests in her husband. But some contracts of a married woman may bind her separate estate in equity (*y*); and, besides this, there are several exceptions to the rule, which are chiefly as follows:—

Cases in which a married woman is in the position of a *feme sole*.

1. Where the husband is banished, or transported, or suffering sentence of penal servitude, the wife can contract, sue or be sued, as if she were a *feme sole*.

2. Where the husband has not been heard of for a period of seven years, she may also do so, as he is then presumed to be dead (*z*).

3. Where a judicial separation has been obtained under the Divorce Act she may also do so (*a*), or where under the Matrimonial Causes Act, 1878, a separation order has been obtained, which that Act provides shall have the same effect as a decree of judicial separation (*b*).

4. Under the Divorce Act (*c*) a married woman may obtain an order, called a protection order, when she has been deserted by her husband, protecting her earnings or property acquired since desertion from her husband and persons claiming under him. Such order may be obtained from the Divorce Division of the High Court

(*y*) See *Hulme v. Tenant*, 1 White and Tudor's Leading Cases in Equity, 521.

(*z*) See *Nepean v. Doe*, 2 S. L. C. 584; 2 M. & W. 894.

(*a*) 20 & 21 Vict. c. 85, s. 25. Of course if an actual divorce takes place the woman is again a *feme sole*.

(*b*) 41 Vict. c. 19, s. 4.

(*c*) 20 & 21 Vict. c. 85, s. 21.

of Justice, or from the police magistrate, or justices in petty session; but if from either of the latter, the order has afterwards to be registered within ten days from the making with the registrar of the county court within whose jurisdiction the wife is resident.

5. By the Married Women's Property Act, 1870 (*d*), the following properties are to be thereafter to the separate use of a married woman, viz., her wages and earnings acquired in any occupation carried on separately from her husband; any deposit made by her in her name in a savings bank; any sum of £20 or upwards in the public stocks transferred into her name; any fully paid-up shares in companies and other institutions to which no liability is attached transferred to her name, and any policy on her own or her husband's life expressed on its face to be to her separate use (*e*).

6. By the same Act it is provided with regard to women *married after* the passing of the Act (9 August, 1870) that any personal property coming to a married woman as a next of kin under an intestacy; any sum, not exceeding £200, coming to her under a deed or will; and the rents and profits of any freehold, copyhold, or customary property descending to her are to be to her separate use (*f*).

It has been decided that a married woman cannot be made a bankrupt in respect of a debt for which she is liable even though she has a separate estate (*g*).

Married woman cannot be made bankrupt.

A married woman usually sues either together with her husband, or by her next friend; but under the Judicature Act, 1875, a married woman may, by the

(*d*) 33 & 34 Vict. c. 93.

(*e*) Sects. 1, 2, 10.

(*f*) Sects. 7, 8.

(*g*) *Ex parte Holland, In re Heneage*, L. R. 9 Ch. App. 307; *Ex parte Jones, In re Grissell*, L. R. 12 Ch. Div. 484.

leave of the Court or a judge, sue or defend without her husband and without a next friend, on giving such security (if any) for costs as the Court or a judge may require (*h*).

The wife's
power of
binding the
husband.

Manby v. Scott.

*Montague v.
Benedict.*

The question of the power of a wife living with her husband to bind him is one of great importance. The earliest leading case constantly referred to upon the subject is that of *Manby v. Scott* (*i*), which may be taken as laying down the broad principle that a wife's contract does not bind the husband, unless she act by his authority. The wife, therefore, may be said to stand in the position of an agent, but to some extent as an agent of a peculiar kind; for the general rule is that, apart from any special power or authority that may be given her, from her very position of living as a wife (*k*), she is *presumed* to be invested with an authority to bind him for necessities suitable to his rank and condition (*l*); but (as was decided in the case of *Montague v. Benedict* (*m*)) this does not extend to anything beyond actual necessities, for as to anything beyond this to bind the husband some evidence of his assent must always be shewn. This case of *Montague v. Benedict* may be usefully noticed by the student upon two points; firstly, as deciding what is just stated, and secondly, as furnishing an instance of what will and what will not be deemed necessities, it there having been held that the husband being a certificated special pleader, and living in a house at the rent of £200 a year, and keeping no man-servant, articles of jewellery to the amount of £83 supplied to the wife in the course of two months were not necessities. As, however, has been noted in the case of

(*h*) 38 & 39 Vict. c. 77, Order XVI. r. 8.

(*i*) 2 S. L. C. 445; 1 Levintz, 4.

(*k*) And this principle applies to a woman living with a man as his wife, though not actually married, and even although the tradesman knows she is not married: *Watson v. Threkeld*, 2 Esp. 637.

(*l*) *Etherington v. Parrott*, Lord Raym. 1006.

(*m*) 2 S. L. C. 483; 3 B. & C. 673.

infants (*n*), what are and what are not necessities must always depend on the circumstances of each particular case.

But a husband is not in all cases absolutely liable for necessities, for as the power of a wife to bind her husband for them only arises from his *presumed* authority to her, such authority is liable to be rebutted by the fact that she was kept fully supplied by her husband with all necessary articles. This is shewn by the well-known case of *Seaton v. Benedict* (*o*), and some of the remarks of Chief Justice Best in that case, as illustrative of the subject, may be well quoted. He says: "A husband is only liable for debts contracted by his wife on the assumption that she acts as his agent. If he omits to furnish her with necessities, he makes her impliedly his agent to purchase them. If he supplies her properly, she is not his agent for the purchase of an article unless he sees her wear it without disapprobation (*p*). . . . It may be hard on a fashionable milliner that she is precluded from supplying a lady without previous inquiry into her authority. The Court, however, cannot enter into these little delicacies, but must lay down a law that shall protect the husband from the extravagance of his wife" (*q*).

Husband not always liable even for necessities

Seaton v. Benedict.

It was formerly considered that when a husband and wife were living together, provided she was not fully supplied with necessities, she must always have power to bind the husband for them, and that no *private* agreement between the parties would deprive her of this power, but it must be communicated to the tradesman (*r*). But this is not now law, the important

Effect of husband forbidding his wife to contract for necessities, or agreement to that effect.

(*n*) *Ante*, p. 176.

(*o*) 2 S. L. C. 491; 5 Bing. 28.

(*p*) This would of course amount to an authority by subsequent ratification.

(*q*) 2 S. L. C. 494.

(*r*) See *Johnston v. Sumner*, 3 H. & N. 261.

Jolly v. Rees.

Explanation
of the last-
mentioned
case.

case of *Jolly v. Rees* (s) clearly deciding that any agreement between the husband and wife, or the fact of the husband forbidding the wife to pledge his credit, though not communicated to the tradesman, will be a bar to any action against the husband; and the Court, in giving judgment in that case, said, "although there is a *presumption* that a woman living with a man, and represented by him to be his wife, has his authority to bind him by her contract for articles suitable to that station which he permits her to assume, *still this presumption is always open to be rebutted.*" This decision may at first sight seem somewhat to militate against the principles of general agency before explained (t), that a principal is liable for all acts of his general agent coming within the scope of his ordinary authority, although done contrary to the principal's directions, if they were not known to the contractee; but *the reason of the decision seems to be that the wife does not actually stand in the position of general agent for her husband, but is only presumed to do so, and that the presumption is always liable to be rebutted.*

Correct answer
to the question
of what con-
tracts by a
married
woman living
with her
husband will
bind him.

To summarise the foregoing remarks, the answer to the question of what contracts of a wife, who is living with her husband, will bind him, may be stated as follows:—All her contracts entered into with his express or implied authority will bind him, and his authority will be implied for necessities, but only for necessities (u); and this implied authority is liable to be rebutted by shewing that she is already fully supplied with necessities (x), or that the husband has forbidden her to pledge his credit, or they have so agreed between them, even although unknown to the tradesman (y).

(s) 15 C. B. (N.S.) 628; 12 W. R. 473; 33 L. J., C.P. 177. This decision has been acted upon lately in various cases. See particularly the very recent case of *Debenham v. Mellor*, 28 W. R. 501.

(t) *Ante*, pp. 106, 107.

(u) *Montague v. Benedict*, *ante*, p. 186.

(x) *Seaton v. Benedict*, *ante*, p. 187.

(y) *Jolly v. Rees*, *Debenham v. Mellor*, *supra*.

Thirdly, as to contracts made after marriage, but whilst the parties are living separate and apart from each other.—The separation makes no difference on the wife's general incapacity to contract, so as to bind herself, and the observations previously made hereon, under the second division of this subject, apply equally here (z); but the wife's power to bind her husband stands on a totally different footing, for in the case of husband and wife living together, we have seen that, from their so living together, the presumption is that the husband is liable for necessaries; but here there is no such presumption, and it is always incumbent on a creditor seeking to charge the husband, to shew that the wife from the circumstances of the separation, or from the conduct of the husband has such an implied authority (a). The wife's power, therefore, to bind her husband by her contracts, depends on the way in which the separation occurs, which may be either by the fault of the husband, by the fault of the wife, or by mutual consent and arrangement.

As to contracts made during separation.

The wife's power to bind her husband depends on the way in which the separation occurs.

Where the separation is by the fault of the husband, *e.g.*, if he either actually turns his wife away, or refuses to receive her, or behaves in such a way, either by cruelty or otherwise, as to render it impossible for her to continue to live with him, unless she has an adequate allowance for maintenance paid to her, she goes forth to the world with full authority to bind him for necessaries, which authority the husband cannot deprive her of, even though he gives particular notice to the tradesman not to trust her (b) and in this case for the husband to exonerate himself by shewing a separate allowance it is a question for the jury whether or not it is adequate (c).

Where the separation is by the husband's fault he is liable for necessaries.

(z) *Ante*, p. 184.

(a) See *Johnston v. Sumner*, 3 H. & N. 261; *Mainwaring v. Leslie*, M. & M. 18; *Eastland v. Burchell*, L. R. 3 Q. B. Div. 432; 47 L. J. Q. B. 500.

(b) *Johnston v. Sumner*, 3 H. & N. 261; *Boulton v. Prentice*, Selwyn's N. P. 334.

(c) *Hodgkinson v. Fletcher*, 4 Camp. 70; *Emmett v. Norton*, 8 C. & P. 506.

But the reverse where the separation is by the wife's fault.

Where the separation is by the fault of the wife, as if she elopes and lives in adultery, or the husband turns her away for adultery, or she, voluntarily, and without fault on his part, simply leaves him, she has no authority to bind him for necessities in any degree (*d*).

Where separation by mutual consent, husband will be liable unless in the case of an express agreement between the separated parties.

Where the separation is by mutual consent, the rule is, that the wife has an implied authority to bind her husband for necessities, unless there is some express agreement between the husband and wife on the subject of the separation and the rights of the wife. Although it was at one time considered that in such a case as this to exonerate the husband, it was necessary to shew that the wife had from some source adequate separate maintenance, it appears to be now clear that it is not necessary to shew this, but that when the parties separate by mutual consent they may make their own terms and conditions, and so long as the separation exists these terms are binding on them both (*e*). If, however, under the agreement of separation, a certain allowance is to be paid, if it is not kept up the wife may bind the husband by contracting to the extent of it (*f*).

Effect of notice in the papers by a husband that he will not be answerable for his wife's debts.

From the foregoing remarks, it will be seen that to give a correct answer to any general question on the power of a wife to bind her husband during separation, the different ways in which the separation may have occurred must be given (*g*). The student may perhaps have sometimes observed in the newspapers occasional notices by husbands that they decline to be answerable for the debts of their wives, and applying to that fact what is stated in the previous pages on the subject of the husband's liability, he will see that any such notice

(*d*) Chitty on Contracts, 170, 171; 2 S. L. C. 512.

(*e*) *Biffen v. Bignell*, 7 H. & N. 877; 31 L. J. Ex. 189; *Eastland v. Burchell*, L. R. 3 Q. B. Div. 432; 37 L. J. Q. B. 500.

(*f*) *Nurse v. Craig*, 2 N. R. 148.

(*g*) See hereon, generally, note to *Manby v. Scott*, *Montague v. Benedict*, and *Seaton v. Benedict*, in 2 S. L. C. 495-517, and cases there quoted.

can have no legal effect or object. If the separation has taken place by the wife's fault, there is no need for any such notice, for the husband is not liable anyhow; if by the husband's fault then he is liable, and any such notice cannot lessen his liability; and if by mutual consent and arrangement the husband is not liable. Again, even if there is no separation but the parties are living together, there is no necessity for any such notice, for the husband may, by a private notice, forbid his wife to pledge his credit.

If a husband, by his conduct, renders it necessary for his wife to protect herself, by applying for him to be bound over to keep the peace, the costs of such application will always fall on the husband, and he will be liable to an action by the solicitor who has incurred such costs, and this even although he allow and pay her separate maintenance, for he has no right to diminish her means by his improper conduct (*h*). And the same rule will, also, generally speaking, apply as to the costs of other proceedings rendered necessary by his conduct, *e.g.*, the costs of the institution of an action for divorce, or for judicial separation, or the costs of necessary advice taken by the wife (*i*).

Husband is liable for the costs of any proceeding rendered necessary by his conduct.

A husband, although he may be liable under the circumstances for necessities supplied to his wife, would not at law have been liable for money lent to his wife even for buying necessities (*k*). It was, however,

Money lent to wife to buy necessities.

(*h*) *Turner v. Rookes*, 10 A. & E. 47.

(*i*) *Brown v. Ackroyd*, 5 E. & B. 819; *Wilson v. Ford*, L. R. 3 Ex. 63. The case of *In re Hooper*, 33 L. J. (Ch.) 300, does not clash against the general rule stated in the text, the reason of the husband being there held not liable being that there was no reasonable foundation for the wife's proceedings, but in so far as any observations in that case tend to decide that to render the husband liable for the cost of any proceedings they must have resulted in actual success, it is submitted that it is clearly not law, and that it is sufficient that there was a reasonable ground for such proceedings. And see hereon 2 S. L. C. 514, 515.

(*k*) *Knor v. Bushell*, 3 C. B. (N.S.) 334.

otherwise in Equity (*l*), and the Equity rule now prevails (*m*)

Effect of contract by wife for necessaries, her husband being dead, though not known to be by her.

It has before been pointed out, in considering the subject of agency, that if a married woman having power to bind her husband for necessaries, contracts for such necessaries after his death, but before she could possibly have known thereof, no liability therefor attaches either to her husband's estate or to herself personally (*n*).

III. Persons of unsound mind.

Persons of unsound mind may be either idiots or lunatics. By the designation idiot, is meant a person who has never from his birth upwards had any glimmering of reason; whilst a lunatic "is one who hath had understanding, but by disease, grief, or other accident, hath lost the use of his reason" (*o*). However, with regard to these two classes of non-sane persons the distinction is of no practical importance as no person is now found an idiot, the inquiry as to the commencement of the insanity not being carried back to the birth (*p*).

A person non compos mentis is generally liable for necessaries.

It was formerly considered that a person could not set up as a defence to an action on a contract that he was of unsound mind when it was entered into, but this is no longer law (*q*). But, although unsoundness of mind may be set up, yet it must not be thought that it will form an answer to every action that may possibly be brought, for it has been decided, firstly that, a person of unsound mind is liable for all necessaries suitable to his state and condition in life, provided no advan-

(*l*) *Deare v. Soutten*, L. R. 9 Eq. 151.

(*m*) Jud. Act, 1873, s. 25 (11).

(*n*) See *ante*, p. 108, and case of *Smout v. Nibery*, 19 M. & W. there referred to.

(*o*) 1 Bl. Com. 304. As to evidence see *post*, p. 395.

(*p*) See hereon, Phillips on Lunacy, 224.

(*q*) Chitty on Contracts, 133.

tage has been taken of his mental incapacity (*r*); and, secondly, that even although the contract may not be for necessaries, yet, if the other party to it had no notice of the person's want of mental capacity, and the contract was *bonâ fide*, and is executed, unsoundness of mind will be no defence (*s*). This latter principle has been well stated as follows: "When a person *apparently of sound mind, and not known to be otherwise*, enters into a contract for the purchase of property which is fair and *bonâ fide*, and which is executed and completed, and the property, the subject-matter of the contract, has been paid for and fully enjoyed, and cannot be restored, so as to put the parties in *statu quo*, such contract cannot afterwards be set aside either by the alleged lunatic or those who represent him" (*t*).

And also sometimes upon a *bonâ fide* executed contract.

It would seem that if a contract is of an executory nature, a person of unsound mind is not liable on it so long as it remains executory, but if for necessaries, and any part of it is executed, then he is liable on such executed part; if not for necessaries, then he will only be liable provided it became executed before the other party to it knew of his want of mental capacity.

But not upon an executory contract whilst it remains executory.

Any acts done by a lunatic during a lucid interval are perfectly valid (*u*).

Acts done during a lucid interval are good.

Although a person may not be strictly of unsound mind, yet if he is of weak capacity, though this by itself would be, generally, no ground of defence to his contract, yet it may afford evidence of undue influence, misplaced confidence, or imposition, so as to render the act a constructive fraud (*x*).

(*r*) *Nelson v. Duncombe*, 9 Beav 211; *Baxter v. Earl of Portsmouth*, 5 B. & C. 170.

(*s*) *Niell v. Morley*, 9 Ves. 478.

(*t*) See judgment in case of *Molton v. Camroux*, 2 Ex. 503.

(*u*) Chitty on Contracts, 136.

(*x*) As to Constructive Frauds, see Snell's Principles of Equity, pp. 464-481.

IV. Intoxicated person.

Intoxication only a defence if the person did not know what he was doing.

In the same way that a person cannot generally (y) shield himself from the consequences of his criminal act by shewing that he was drunk at the time, it was formerly held that he could not be allowed to set up his intoxication as a defence to an action upon a contract made by him. However, the law now is, that if a person is in such a state of intoxication as not to know what he is doing, so that, indeed, his reason is for the time being destroyed, he cannot be said to have any agreeing mind, and his contract, made whilst he is in such a state, cannot be enforced, unless he afterwards when sober ratifies it, which he may do, for it is only voidable and not absolutely void. And intoxication can never be any defence to an action for things actually supplied for the person's preservation (z).

V. Persons under duress.

A person is said to be under duress when he is subjected to great terror or violence, *e.g.*, if his person is wrongfully detained, or even legally detained and excessive and unnecessary violence is used, or if he is threatened with loss of life or serious injury. Any contract made by a person who is under duress is, as regards him, void, and cannot be enforced against him. And though a contract may be entered into under circumstances that would not at common law constitute duress, yet such circumstances may possibly amount to constructive fraud, so as to afford ground for an application to the Chancery Division of the High Court of Justice to set it aside, or form a defence to any action on such contract (a).

VI. Aliens.

An alien may be defined as a subject of a foreign state, and may be an *alien ami*, that is, a subject of a friendly state, or an *alien enemy*, that is, a subject of a state at enmity with ours.

(y) The word "generally" is used here, because in some crimes in which it is necessary to shew malice drunkenness may sometimes be shewn as evidence to rebut the existence of malice.

(z) See hereon, Chitty on Contracts, 136, 137.

(a) As to Constructive Frauds, see Snell's Principles of Equity, 464-481.

Contracts with aliens may be considered as of two classes :—

1. Their contracts as to pure personal property ; and
2. Their contracts as to land, and property of that nature.

Firstly, then, as to the former. By the Act to amend the law relating to aliens (b) it was enacted that they might hold by purchase, gift, bequest, presentation, or otherwise, every kind of personal property, except chattels real, as fully and effectually, to all intents and purposes, and with the same rights, remedies, exemptions, privileges and capacities, as if they were natural-born subjects of the United Kingdom (c). But with regard to the contracts of aliens, on the ground of public policy and expediency, though an *alien ami* might contract and sue, yet the contract of an *alien enemy* was absolutely void ; and even with regard to the contract of an *alien ami*, if after the contract war broke out, so that he thus became an *alien enemy*, his remedy here was suspended until the war ceased, and he again became an *alien ami* (d). The Naturalization Act, 1870 (e), now also provides that real and personal property of every description may be taken, acquired, held, and disposed of, by an alien in the same manner in all respects as by a natural-born British subject ; and that a title to real and personal property of every description may be derived through, from, or in succession to an alien, in the same manner in all respects as if a British subject (f), provided that this shall not qualify an alien for any office, or for any municipal, parliamentary, or other franchise (g), nor

Their contracts as to pure personal property.

Naturalization Act, 1870.

(b) 7 & 8 Vict. c. 66.

(c) Sect. 4.

(d) See Chitty on Contracts, 178.

(e) 33 Vict. c. 14.

(f) Sect. 2.

(g) Ibid.

shall it qualify him to be the owner of a British ship, or any share therein (*h*).

It may possibly be considered, that, by reason of this comprehensive provision, the distinction as to their contracts between an *alien ami* and an *alien enemy* is now done away with, and that an *alien enemy* may contract and sue in the same way as an *alien ami*, but as the before-mentioned distinction was founded on principles of public policy and expediency (*i*), this may possibly be considered at present as somewhat doubtful (*k*).

Their contracts
as to land.

Secondly, regarding aliens' contracts as to land, they were until lately prohibited from holding any lands in this country, except that an *alien ami* might hold a lease for not exceeding twenty-one years for the purpose of residence or occupation of himself or his servants, or for the purpose of any business, trade, or manufacture (*l*), but now, by the provision in the Naturalization Act, 1870 (*m*), real as well as personal property may be held by an alien.

An alien, although not in this country, may be sued here if the cause of action arose within the jurisdiction, but no writ of summons in such a case can be issued without the leave of the Court or a judge (*n*). The writ itself is not served on the alien, but notice of it (*o*).

(*h*) 33 Vict. c. 14, s. 14.

(*i*) Broom's Coms. 599.

(*k*) The learned editors of the work, 'Chitty on Contracts,' however, clearly give it as their opinion that the Naturalization Act, 1870, has done away with all such distinction. They state as follows: "As the statute appears to give this power" (the power of holding and disposing of all property), "to all aliens, whether they be the subjects of a friendly state or not, and whether they reside in this country or not; and the power so given cannot be enjoyed without entering into contracts for the taking, acquiring, and disposing of real and personal property; it seems to follow that all aliens are now enabled to enter into such contracts, and may now enforce by action in our courts any obligation arising therefrom."—See Chitty on Contracts, 179.

(*l*) 7 & 8 Vict. c. 66, s. 5.

(*m*) 33 Vict. c. 14, *ante*, p. 195.

(*n*) Order II., r. 4, in Schedule to Judicature Act, 1875, and notes thereon in Griffith's Judicature Acts, 158-163. Indermaur's Manual of Practice, 33, 34.

(*o*) Ibid.

CHAPTER VIII.

OF THE LIABILITY ON CONTRACTS, THEIR PERFORMANCE,
AND EXCUSES FOR THEIR NON-PERFORMANCE.

In this chapter it is proposed to consider the position of a person who has entered into a contract, and other points incidental thereto.

When any person enters into a valid contract, it follows, as a matter of course, that he thereby incurs a liability to perform such contract, and must either perform it, or shew some good excuse for not doing so. This liability on a contract arises directly it is entered into, and if it is for the doing of some immediate act, the remedy of the other party to the contract in respect of such liability may be immediately taken, *e.g.*, if A. for consideration agrees to immediately take B. into his employment, and fails to do so, B. may at once sue him for the breach of his contract. But if the contract is for the doing of an act at some future day, then generally the remedy of the other party in respect of such liability cannot be taken until the future day; *e.g.*, if A. for consideration agrees to employ B. at some future day, the remedy cannot, of course, be taken until that future day. To this rule there is, however, one important exception, which may be stated to be that where there is an executory contract under which nothing has been done, and the person liable to do the act before the happening of the future day expressly states that he will not do the act when the future day arrives, or renders himself before the day incapable of doing the act, the remedy may be taken against him at

When a liability on a contract arises.

When on an executory contract a liability arises before the day arrives for doing the act.

*Hochster v.
De la Tour.*

*Frost v.
Knight.*

To entitle a
person to sue
on a contract
he must have
performed his
part of it.

*Cutter v.
Powell.*

once, though the time for performance has not actually arrived (*p*). This is well shewn by the case of *Hochster v. De la Tour* (cited below). In that case there was an agreement to employ the plaintiff as a courier from a day *subsequent* to the date of the writ, and before the time for the commencement of the employment the defendant refused to perform the agreement, and discharged the plaintiff from performing it, and he at once commenced his action for breach of this contract. It was objected that he could not sue until the future day arrived, but it was held that he might do so, and the principle before stated was laid down. Again, in the case of *Frost v. Knight* (also cited below), the defendant had promised to marry the plaintiff on the death of his father; and he had afterwards, during his father's lifetime, announced his absolute determination never to fulfil the promise, and it was held that the plaintiff might at once regard the contract as broken in all its obligations and consequences, and sue thereon.

Where a special contract is entered into by a person, to entitle him to his remedy against the other party to it, it is very necessary that he himself should strictly carry out on his part the stipulations of the contract. Thus, where the agreement was to pay a man a certain sum provided he proceeded, continued, and did his duty as mate of a ship during a certain voyage, and he died during the voyage, it was held that his representatives could not recover, for the contract had not been strictly carried out by the deceased, and therefore no right of suing had accrued (*q*). But although, where there is a special contract, the remedy must be on that special contract, and therefore there can generally be no remedy when the person suing has not himself performed its stipulations, yet if the special

(*p*) *Hochster v. De la Tour*, 2 El. & Bl. 678; *Frost v. Knight*, L. R. 7 Ex. 111.

(*q*) *Cutter v. Powell*, 2 S. L. C. 1; 6 T. R. 320; see also *Hulle v. Heightman*, 2 East, 145.

contract has been abandoned or rescinded by the parties, then an action will lie for what has been done by the person suing on a *quantum meruit* (*r*); and it may be stated, as a correct general rule, that where there is a special contract not under seal, and one of the parties refuses to perform his part of it, or renders himself absolutely unable to do so, it is open to the other party to at once rescind such special contract, and immediately sue on a *quantum meruit* for whatever he has done under the contract previously (*s*). But to entitle a person so to rescind a special contract on the ground of the refusal of the other party to perform it, such refusal must be absolute and unqualified, and a mere conditional refusal will not be sufficient (*t*).

But when a special contract has been rescinded or abandoned action may be brought on a *quantum meruit*.

What refusal will justify a party to a contract in rescinding it.

The liability of a person upon a contract may be put an end to either—

How the liability on a contract may be put an end to.

1. By its performance ; or,

2. By shewing some excuse for its non-performance,

Firstly, as to the performance of contracts. Contracts may be and are of the most varied nature, and they must be carried out according to the stipulations in each particular case, attention being paid always to the ordinary and well-known rules of construction, *e.g.*, that the intention of the parties shall be observed, that the construction shall be liberal, and, failing all other rules of construction, that the contract shall be taken most strongly against the grantor or contractor (*u*). The most practically useful points to consider under this head appear to be Payment, Tender, and Accord and Satisfaction.

I. Performance of contracts.

(*r*) That is to say, for as much as it is worth, see Brown's Law Dict. 297.

(*s*) *Planche v. Colburn*, 8 Bing. 14 ; *Withers v. Reynolds*, 2 B. & Ad. 882.

(*t*) See *Lines v. Rees*, cited 2 S. L. C. 36.

(*u*) For rules of construction, see *ante*, pp. 20--26.

1. Payment.

Payment by a third person voluntarily not a performance unless afterwards ratified and accepted.

Payment has been defined as the normal mode of discharging any obligation (x), and payment by a person liable on a contract to the other party to it of the amount which is actually agreed on between them to be payable in respect of the contract naturally puts an end to it and furnishes a complete performance. But a payment made under a contract to amount to performance must be actually made by the party, or some one on his behalf, and if made by some third person voluntarily it amounts to no performance, and does not destroy the contracting party's liability, unless afterwards ratified and accepted by him as his act (y). But this, of course, is only where the payment is made voluntarily; if made—as by a surety—in pursuance of a legal obligation, then the contract is performed as far as the original liability is concerned, and a new performance is necessary, viz., the repayment to the surety (z)

Payment must be made to the creditor or a person authorized by him.

It is, of course, also necessary, to make the payment a performance of the contract, that it should be actually made to the person, or one having authority from him, either as a particular or a general agent, to receive it.

Payment to a solicitor in an action sufficient.

Payment in an action to the plaintiff's solicitor is equivalent to payment to the plaintiff; but it seems payment to the agent of the plaintiff's solicitor does not so operate (a).

Where there are several sums of money due from one person to another at different times, and the party liable to pay makes a payment, but not sufficient to discharge his liability in respect of the whole of the debt, the question arises, in respect of which matter is it to operate as

(x) Brown's Law Dict. 270.

(y) See *Simpson v. Eggington*, 10 Ex. 845.

(z) As to sureties, see *ante*, pp. 40–43.

(a) *Yates v. Freckleton*, 2 Doug. 625.

a performance or part performance? The answer to this question is known as the rule as to the appropriation of payments, and is, that the party liable to performance, *i.e.*, the debtor, has the right in the first instance to declare in respect of which contract or debt the payment is made; failing his doing so, the person entitled to performance, *i.e.*, the creditor, has such right; and failing either doing so, then the law considers the payment to be in respect of the contract or debt which is the earliest in point of date, commencing with the liquidation of any interest that may be due (*b*). And where, under this rule, the creditor has the right of appropriating the money, he may appropriate it to a debt barred by the Statute of Limitations (*c*). Where a payment is made to a person to whom two or more debts are due of a sum not sufficient to satisfy all, and the debts are owing in respect of contracts of the same date, the amount paid, unless expressly appropriated by one of the parties, will be apportioned between the different debts (*d*).

Rule as to appropriation of payments.

Where the performance that is required by a contract is the payment of a fixed sum of money, it is no sufficient performance for the debtor to pay a smaller sum, even though the parties expressly so agree, and the party to whom the payment is made gives a receipt expressly stating that it is received in full discharge (*e*), the reason being that there is no consideration for the smaller sum being received in satisfaction of the greater; and as an ordinary simple contract requires a consideration to support it (*f*), so here there must be some consideration for the giving up of the balance. But if something is given in performance of an obligation

A smaller sum cannot be a satisfaction of a greater

Cumber v. Wane.

But something different, though of less value, may be a satisfaction.

(*b*) *Clayton's Case*, in *Devaynes v. Noble*, 1 Mer. 585; *Tudor's Mercantile Cases*, 1, and notes thereto.

(*c*) *Mills v. Fowkes*, 5 Bing. (N.C.) 455.

(*d*) *Favenc v. Bennett*, 11 East, 36.

(*e*) *Cumber v. Wane*, 1 S. L. C. 357; 1 Strange, 436; *Fitch v. Sutton*, 5 East, 230. A smaller sum paid by a third party may satisfy a greater: *Lawder v. Peyton*, 11 Irish Reps. C. L. 41.

(*f*) See *ante*, pp. 27, 31.

of a different nature, there may be a complete satisfaction, though of less value; thus, a horse may be given in satisfaction of a debt, though of much less value than such debt; and it has been expressly decided that a negotiable security may operate, if so given and taken, in satisfaction of a debt of greater amount, the circumstance of negotiability making it in fact a different thing and more advantageous than the original debt, which was not negotiable (*g*); and where there is any doubt or disagreement on the amount of a debt, and in all cases of unliquidated demands, the rule that a smaller sum cannot satisfy a greater does not apply, nor does it if the time for payment is accelerated, or any other advantage given to the payee, for in such cases there is a consideration—in the one case the settlement of doubts, and in the other the obtaining the money before it would be otherwise paid (*h*).

A smaller sum may satisfy a greater if a receipt under seal is given, or on a composition under the Bankruptcy Act, 1869.

A smaller sum may, however, be paid in satisfaction of a greater if the receipt is under seal, for this would be a deed, which, as we have seen, requires no consideration to support it, and operates also by way of estoppel (*i*). And under the Bankruptcy Act, 1869 (*k*), a majority of the creditors of any person assembled at meetings convened as therein mentioned, may by resolution agree to accept a composition in satisfaction of their debts, which is to be binding on the other creditors, and the payment of which composition is to discharge the debtor (*l*).

Performance of a contract may sometimes be presumed.

Performance of a contract will in some cases be presumed until the contrary is shewn, *e.g.*, from lapse of time; and where there is money coming due from time to time, *e.g.*, rent, the production of a receipt for a payment will be presumptive evidence that all rent that

(*g*) *Sibree v. Tripp*, 15 M. & W. 23.

(*h*) See notes to *Cumber v. Wane*, 1 S. L. C. 360 *et seq.*

(*i*) *Ante*, pp. 11, 14.

(*k*) 32 & 33 Vict. c. 71, s. 125.

(*l*) See Ringwood's Principles of Bankruptcy, 92-97.

has become due before that date has been paid. But a receipt, even, for any particular sum, is not conclusive evidence of payment of that sum, but, like other presumptions generally, the fact of the receipt may be controverted (*m*).

Payment should strictly be made in money or bank notes, but if a cheque is given and received, that operates as payment unless and until dishonoured; and if a cheque is given in payment, the payee is guilty of laches in not presenting it for payment within the proper time, so that if in the meantime the banker fails, having assets of the customer in his hands, the person to whom the cheque was paid has no further claim for payment (*n*). So, also, a bill of exchange, or other negotiable security, may operate as payment, and during its currency the remedy for recovering the debt is suspended (*o*); but upon the dishonour of the instrument the original remedy revives unless it be then outstanding in the hands of a third person for value, in which case it does not (*p*). On the dishonour of a bill, note, or cheque, given in payment, the creditor may sue either for the original debt or on the instrument itself.

Effect of
payment by
cheque.

Or by a
negotiable
security.

If a creditor requests his debtor to make payment by transmission through the post, the debtor is safe in adopting that course, provided he properly addresses and sends the letter; but unless there is such a request made, either expressly or impliedly, if the money is lost in transmission the debtor will have to pay it over again (*q*).

Payment by
transmission
through the
post.

When an action is brought to recover either a fixed sum

Payment into
court.

(*m*) *Stretton v. Rastell*, 2 T. R. 366.

(*n*) See hereon, *ante*, p. 144.

(*o*) Per cur. *Belshaw v. Bush*, 11 C. B. 191; *Simon v. Lloyd*, 2 Cr. M. & R. 187; Byles on Bills, 392.

(*p*) *Puckford v. Maxwell*, 6 T. R. 52; *Price v. Price*, 16 M. & W. 232; *Gunn v. Bolckow*, L. R. 10 Ch. App. 491.

(*q*) See Chitty on Contracts, 682.

or even unliquidated damages, and the defendant admits his liability, either entirely or to a certain amount, he can now immediately, or with his statement of defence, or subsequently by leave of the Court or a judge, pay the amount that he admits into court (r).

2. Tender.

By tender is meant the act of offering a sum of money in satisfaction of some claim; if it is accepted it of course is payment, but if refused, it is simply a tender, and amounts to a performance as far as the debtor is able of himself to effect performance. The advisable course to be taken by a person on whom a claim is made of a pecuniary character, and reduced or reducible to a certainty, and who admits a liability but not to the full amount claimed, is to tender to the other person the amount which he admits, and it is therefore important to properly understand what will be a valid tender and how a valid tender may be made.

What will
constitute a
valid tender.

A tender may be made either by the debtor or some one on his behalf, and either to the creditor personally, or some one who has been duly authorized by him to receive the money (s), *e.g.*, if a solicitor writes for payment of a debt, tender may be made to him. The tender must be made of the actual debt that is *due*, and nothing less than it, but tender of an amount in excess of the debt is a perfectly good tender provided change is not required, or if required, provided that no objection is made to the tender on that ground (t), and the tender must be made before any action has been commenced for recovery of the sum claimed. If any action has been commenced before tender, the proper course was formerly to have taken

Course to be
taken where
no tender
made before
action brought.

(r) Judicature Act, 1875, Order xxx. r. 1; Indermaur's Manual of Practice, 58, 59. As to the effect of payment into court, see *post*, Part 3, ch. 2, pp. 414, 415.

(s) Chitty on Contracts, 730. It may be noticed that tender by one of several joint creditors is good, operating as tender by all, see *Douglas v. Patrick*, 3 T. R. 683.

(t) *Dean v. James*, 4 B. & A. 546.

out a summons to stay the action on payment of the amount admitted, which operated in the nature of a tender from that time, so that if it was not acceded to, and the action was proceeded with, and the plaintiff did not recover a sum exceeding the amount named in the summons, all the subsequent costs were thrown on him. But now there is no need for any such summons, nor is any such summons allowed, the proper course being for the defendant to at once pay into court the sum that he admits (*u*), and the plaintiff may take that sum out of court in full satisfaction, or may proceed for the balance, but if he does not recover more than was paid into court he will have to bear the costs subsequent to the payment in.

To constitute a tender it is not sufficient for the debtor to merely say he will pay the money, or even that he has it with him; there must be an actual production of the money itself, unless indeed the creditor expressly dispenses with the production of it at the time (*x*). A good illustration of what will amount to dispensing with the production of the money is found in the following circumstances: The defendant said to the plaintiff, "I have eight guineas in my pocket, which I have brought for the purpose of satisfying your demand;" the plaintiff said he need not trouble himself by offering it as he should not accept it, whereupon the money was not produced, and it was held that this was a sufficient tender (*y*).

In making a tender the money should be actually produced.

Unless the creditor dispenses with its production.

A tender must be absolute and unconditional, for if a tender is made with some condition annexed to it that will prevent its being a valid tender; thus, for instance, in case a receipt is wanted, the proper course is for the debtor to bring a stamped receipt with him

Tender must be unconditional.

(*u*) Judicature Act, 1875, Order XXX. r. 1; Indermaur's Manual of Practice, 58.

(*x*) *Thomas v. Evans*, 10 East, 101.

(*y*) *Douglas v. Patrick*, 3 T. R. 683, quoted in Chitty on Contracts, 734.

and ask the creditor to sign it and pay him the amount of the stamp (z); again, also, a sum offered if the creditor would accept it, in full discharge of a larger sum claimed, has been held not to be a valid tender (a). It seems a tender under protest is good (b).

But a tender under protest is good.

In what money a tender may be made.

A tender must (except as is presently mentioned) be made in money or bank notes. By 3 & 4 Wm. 4, c. 98 (c), it is provided that tender of Bank of England notes payable to bearer on demand shall be a valid tender for all sums above £5, except by the governor and company of the Bank of England, or any branch thereof. By 33 Vict. c. 10. 33 Vict. c. 10 (d), it is provided that a tender of money in coins which have been issued by the Mint in accordance with the provisions of that Act shall be a legal tender—

In the case of gold coins, for the payment of any amount;

In the case of silver coins, for the payment of any amount not exceeding 40s., but for no greater amount;

In the case of bronze coins, for the payment of an amount not exceeding 1s., but for no greater amount.

But nothing in this Act contained is to prevent any paper currency which under any Act is a legal tender from still being a legal tender.

When country notes or cheques are a good tender.

Notwithstanding that a tender should usually be actually in money or Bank of England notes, yet a tender of country notes, or of a draft or cheque on a banker, is valid if the creditor at the time raises no objection to the tender being made in that way.

(z) *Laing v. Meader*, 1 C. & P. 257.

(a) *Evans v. Judkins*, 4 Camp. 156.

(b) *Scott v. The Uxbridge Ry. Co.*, 14 L. T. Rep. (N.S.) 596.

(c) Sect. 6.

(d) Sect. 4.

Although a creditor rejects a tender that is made to him by his debtor, yet he has afterwards a right to demand payment of the amount previously tendered, which if refused will make the case as if no tender had been made (e); the reason of this being, that the very principle of tender is that the person was then ready, and afterwards remains ready, to pay the amount tendered (f).

Person tendering must be ready to pay the money at any time afterwards though the tender was refused.

It only remains now to consider what is the effect of a tender when it has been actually and properly made. It naturally does not put an end to the creditor's claim, for we have seen that the creditor has a right to come and demand the amount tendered, though he at first refused it; the only effect of it as a defence is, that if it is the fact that the amount tendered was the whole amount due, although interest may be payable, no subsequent interest can be recovered, and the debtor will be entitled to his costs of any action that may subsequently be brought against him (g). On any action being brought, the proper course for the defendant to take is to set up the tender in his statement of defence, and pay the money into court. The effect of the defendant setting up tender as a defence will naturally be to admit the contract and a liability on it to the amount of the tender.

Effect of tender.

Accord and satisfaction has been defined as "a defence in law, consisting (as the name imports) of two parts, viz., something given or done to the plaintiff by the defendant as a satisfaction, and agreed to (or accorded), as such by the plaintiff" (h): it therefore amounts to a performance of a contract, though not in the original way agreed on, yet in some other way

3. Accord and satisfaction.

(e) The demand must be personal and not by letter: *Edwards v. Yates*, R. & M. 360.

(f) Chitty on Contracts, 737.

(g) See *Dixon v. Clark*, 5 C. B. 365.

(h) Brown's Law Dict. 7. See also the term "Accord and Satisfaction" explained, per Maule, J., in *Gabriel v. Dresser*, 15 C. B. 628.

Consists of
two parts.

afterwards agreed on, and furnishes an answer to any action on it (i). This mode of performance, as is stated in the definition, consists of two parts, viz., (1) the accord, which is the agreement to do some act in lieu of the original act contracted to be done; and (2) the satisfaction, which is the subsequent carrying out of such agreement; and it also follows, from the definition, that accord without satisfaction, or satisfaction without accord, is not a complete defence to an action (k). An instance of what would amount to a perfect accord and satisfaction would be as follows: A. claims a sum from B., and it is agreed between them that B. shall give a bill of exchange for the amount, drawn by himself and accepted by C., and that, if duly met at maturity, he shall be exonerated from all further liability, and B. duly procures the bill and tenders it to A. (l). Here the agreeing to give the bill is the accord, and the giving it or tendering it the satisfaction.

The value of
the satisfaction
cannot be
inquired into.

Where there is an accord and satisfaction, the value of the satisfaction cannot be inquired into, provided it is shewn that it is of some value (m); but an agreement to pay a smaller sum than some fixed liquidated amount due, and the subsequent payment of such smaller sum, will not (as has been already stated in discussing Payment (n)) operate as any satisfaction of such greater sum.

If an accord and satisfaction has been brought about by means of any fraud, it will be set aside on application to the Chancery Division of the High Court of Justice, in the same way that any contract induced by fraud may be set aside (o).

(i) See *Blake's Case*, 6 Reps. 43 b.

(k) See *Parker v. Ramsbottom*, 3 B. & C. 257; *Hardman v. Bellhouse*, 9 M. & W. 596.

(l) See *Curlewis v. Clarke*, 18 L. J. (Ex.) 144.

(m) *Pinnel's Case*, 5 Reps. 117 a; *Curlewis v. Clarke*, *supra*.

(n) See *ante*, p. 201, and cases there cited.

(o) *Stewart v. Great Western Ry. Co.*, 2 De G. J. & S. 319.

Accord and satisfaction in respect of a liability under seal could not generally be made at law, but it would have operated as a defence in Chancery; under the Common Law Procedure Act, 1854 (*p*), this might, however, have been set up as an equitable defence, and now, by the Judicature Act, 1873 (*q*), it is provided "that if any defendant claims to be entitled to any relief upon any equitable ground against any deed, instrument, or contract, or alleges any ground of equitable defence to any claim of the plaintiff, the Court shall give to every equitable defence so alleged such and the same effect by way of defence against the claim as the Court of Chancery ought to have given if the same or the like matters had been relied on by way of defence in any suit or proceeding instituted in that court for the same or the like purposes before the passing of the Act."

Accord and satisfaction may, under the Judicature Act, 1873, be set up as a defence to a liability under seal.

Secondly, as to excuses for the non-performance of contracts; and these may be various, both from the different natures of contracts themselves, and from the circumstances that may arise in particular cases to justify a contracting party in not carrying out his contract. Of these excuses it will be most useful to consider the following, viz., The Statutes of Limitation, Set-off, Release, Bankruptcy or Liquidation, and Composition with Creditors, Incompetency of the Party, and Fraud and Illegality.

II. Excuses for the non-performance of contracts.

The Statutes of Limitation are certain statutes that have been passed for the purpose of establishing fixed periods or limits after which actions cannot be brought, and claims, or the remedies whereby such claims might have been enforced, are extinguished and gone. There are several of these statutes, and different periods are

1. Statutes of Limitation.

(*p*) 17 & 18 Vict. c. 125, s. 83.
(*q*) 36 & 37 Vict. c. 66, s. 24.

As to records
and specialties,
3 & 4 Wm. 4,
c. 42.

fixed within which different actions must be brought (*r*) To take contracts by record and specialty first. It is provided by 3 & 4 Wm. 4, c. 42, that all actions for rent upon any indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or *scire facias* upon any recognisance, shall in future be brought within twenty years after the cause of such action or suit accrued, and not after (*s*); and if any person shall be an infant, *feme covert*, or *non compos mentis*, at the time of the cause of action accruing, then such person shall be at liberty to commence the same within such time after coming of full age, being discovert, or of sound memory, as other persons having no such impediment should have done (*t*); and that if any person or persons, *against* whom there shall be any such cause of action, is or are or shall be, at the time of such cause of action accruing, beyond the seas, then the person or persons entitled to any such cause of action shall be at liberty to bring the same against such person or persons within such times as are before limited after the return of such person or persons from beyond the seas (*u*). It is also provided that if there shall have been any acknowledgment of the debt in writing signed by the party liable or his agent, or any part payment or part satisfaction, then there shall be a like period of twenty years from such acknowledgment, part payment, or part satisfaction (*x*).

(*r*) The following are some of the chief periods of limitation:—

On a specialty contract	20 years.
For recovery of share of personalty } under an intestacy	20 years.
For recovery of land	12 years.
For recovery of a legacy	12 years.
On a simple contract	6 years.
For libel	6 years.
For assault	4 years.
For false imprisonment	4 years.
For slander	2 years.

(*s*) Sect. 3.

(*t*) There was also by this statute a further period allowed in the case of the absence of the *creditor* beyond seas, but this is not so now. See 19 & 20 Vict. c. 97, s. 10.

(*u*) Sect. 4.

(*x*) 3 & 4 Wm. 4, c. 42, s. 5.

To next take simple contracts. We find that the statutory provision as to them is of much earlier date, it being provided by 21 Jac. 1, c. 16 (y), that all actions of account and upon the case (which includes *assumpsit*, that is, actions upon ordinary simple contracts), and all actions of debt grounded upon any lending or contract without specialty, and all actions of debt for arrears of rent, shall be commenced and sued within six years next after the cause of action arises, and not after (z). The same statute (a) also provides that in case the person to whom any cause of action accrues shall be at the time an infant, *feme covert*, or *non compos mentis*, then such person shall be at liberty to commence the same within such time after coming of full age, being discovert, or of sane memory, as other persons having no such impediment should have done (b).

As to simple contracts,
21 Jac. 1, c. 16.

By a subsequent statute (c), it has been provided that if any person or persons *against* whom there shall be any cause of action shall at the time of its accrual be beyond seas, then the person or persons entitled to any such cause of action shall be at liberty to bring the same against such person or persons within such time as before limited, after his or their return from beyond seas. On the meaning of the term "beyond seas," it has been further provided (d), that "no part of the United Kingdom of Great Britain and Ireland, nor the islands of Man, Guernsey, Jersey, Alderney, and Sark, nor any island adjacent to any of them, being part of the dominions of Her Majesty, shall be deemed to be beyond seas within the meaning of the said enactment."

Meaning of
"beyond seas."

(y) Sect. 3.

(z) This statute of 21 James 1, c. 16, contains an exception as to accounts in the trade of merchandise between merchant and merchant, but such exception no longer exists. See 19 & 20 Vict. c. 97, s. 9.

(a) Sect 7.

(b) There was also by this statute a further period allowed in the case of the creditor beyond seas, but this is not so now. See 19 & 20 Vict. c. 97, s. 10.

(c) 4 & 5 Anne, c. 16, s. 19.

(d) 19 & 20 Vict. c. 97, s. 12.

Effect of one or some only of several joint debtors being beyond seas.

Where there are several joint debtors or other persons jointly liable on a contract, some only of whom are beyond seas, the Statutes of Limitation run against those that are here, notwithstanding the absence beyond seas of the other or others of them (e).

The Statutes of Limitation as to contracts only bar the remedy, not the right.

Such, then, being the chief legislative enactments as to the limitation of actions on contracts, it follows that if the periods allowed go by, generally speaking there is no further remedy on the contract; and it should be observed that these statutes do not discharge the debt actually, but simply bar the remedy, so that a person having a lien will continue to have that lien, although his debt is statute barred, and therefore he cannot bring any action to recover it (f). With regard to the further periods allowed in the case of disability, it should be observed that the disability must be existing at the time of the accrual of the cause of action, and no subsequent disability will be of any effect, for when once the time of limitation has begun to run, nothing will stop it (g): thus, if at the time of the accrual of a liability under a contract, the person who has incurred such liability is here, though he goes beyond seas the next day, yet the party, having the right against him, has no further time allowed him to enforce that right, though he would have had, had the other been actually beyond seas at the time of the liability accruing.

The ways in which the effect of the Statutes of Limitation may be prevented.

But, notwithstanding these provisions, the debt may be revived, or the Statutes of Limitation prevented from applying, in the following ways:

(e) 19 & 20 Vict. 97, s. 11.

(f) Per Lord Eldon, *Spears v. Hartley*, 3 Esp. 81. This is different to the Statutes of Limitation relating to land, which not only bar the remedy, but also the right. As resulting from what is stated in the text it may be noticed that it has been held that where a legacy is given by a testator to his debtor and at the testator's death the debt is statute barred, yet the executor is justified in setting off the statute barred debt against the legacy: *Coates v. Coates*, 33 L. J. (N.S.) Ch. 448.

(g) Per Cur. *Rhodes v. Smethurst*, 6 M. & W. 351; *Gregory v. Hurrill*, 5 B. & C. 341.

1. By an acknowledgment.
2. By payment of interest.
3. By part payment; and
4. By the suing out a writ of summons.

As to the acknowledgment to take a case out of the statutes, it will have been observed that the 3 & 4 Wm. 4, c. 42 (the statute as to records and specialties), expressly provides that it must be in writing, but in the 21 Jac. 1, c. 16 (the statute as to simple contracts), there is no such provision, and formerly a verbal admission of the debt before the expiration of the six years allowed was sufficient, provided it contained an express promise to pay, or was in such distinct and unequivocal terms that a promise to pay upon request might reasonably be inferred from it (*h*), so that where the acknowledgment set up was in the following words: "I know that I owe the money, but . . . I will never pay it," it was held this was no sufficient acknowledgment, because the very words negatived a promise to pay (*i*). This is still what must be the nature of an acknowledgment to take the case out of the statutes, so that, in every case where it is disputed whether words used do or do not amount to an acknowledgment, the criterion is,—do they contain an actual promise to pay, or can such a promise be inferred? Thus, in a recent case (*k*), the defendant had written to the plaintiff saying that "he would feel obliged to him to send in his account up to Christmas last," and it was held that a promise to pay what was due could be inferred from these words, and therefore that they operated as a valid acknowledgment.

What will be a sufficient acknowledgment to take a case out of the Statutes of Limitation.

A mere parol acknowledgment will not, however, An acknowledgment must now always be in writing.

(*h*) *Williams v. Griffiths*, 3 Ex. 335; *Smith v. Thorne*, 18 Q. B. 134.

(*i*) *A'Court v. Cross*, 3 Bing. 328.

(*k*) *Quincey v. Shurp*, 45 L. J. (Ex.) 347.

now be sufficient, for it has been provided by Lord Tenterden's Act (*l*), that no acknowledgment or promise by words only shall be sufficient unless in writing signed by the party chargeable therewith (*m*), and by the Mercantile Law Amendment Act (*n*), it is enacted that such an acknowledgment may be signed by an agent of the party duly authorized.

Effect of an acknowledgment by one of several joint debtors or joint contractors.

In the case of several persons being liable jointly upon a contract, and one of them giving an acknowledgment, though without the consent or knowledge of the other or others, it was formerly held that it took the case out of the Statutes of Limitation, not only as against that one but against all (*o*). The contrary is, however, now the law, it having been provided by Lord Tenterden's Act (*p*), that where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor or administrator, shall lose the benefit of the Statutes of Limitation so as to be chargeable in respect or by reason only of any written acknowledgment or promise made or signed by any other or others of them, and that in any action brought against several joint contractors, where one has given an acknowledgment, judgment may be given against that one (*r*).

An acknowledgment must be before action.

An acknowledgment must be made before any action is brought (*r*). The person to whom the acknowledgment should properly be made is the creditor, or some one on his behalf, and if it is merely made to a third person it is very doubtful whether it is sufficient to take the case out of the statutes; so also in the case of

Quære as to acknowledgment made to a third person.

(*l*) 9 Geo. 4, c. 14, s. 1.

(*m*) It is, however, expressly provided in this section, "that nothing therein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person."

(*n*) 19 & 20 Vict. c. 97, s. 13.

(*o*) *Whitcombe v. Whiting*, 1 S. L. C. 642; Dougl. 652.

(*p*) 9 Geo. 4, c. 14.

(*q*) Sect. 1.

(*r*) *Bateman v. Pinder*, 3 Q. B. 574.

a promissory note, if the maker gives an acknowledgment to the payee, it is doubtful whether that can be made available to defeat the statute in an action by a subsequent party to the note (s).

As to payment of interest or part payment of the debt, this always has been and is still sufficient to take a case out of the Statutes of Limitation. The part payment indeed is evidence of a fresh promise to pay, and it must be made under such circumstances that a promise to pay the balance may be inferred (t). Payment to an agent will be sufficient, and it is said that where there are accounts with items on both sides, the going through them and striking a balance converts the set-off into a payment, so as to take the case out of the statute (u).

In the case of several persons liable upon a contract, in the same way that it was formerly held that an acknowledgment by one would take the case out of the Statutes of Limitation as against all, so in the case of part payment of principal or payment of interest by one, it was also held that it extended to all (x). The contrary as to this also is, however, now the law, it being provided by the Mercantile Law Amendment Act, 1856 (y), "that when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only, or jointly and severally, or executors or administrators of any contractor, no such co-contractor or co-debtor, executor or administrator, shall lose the benefit of the said enactments" (i.e., the Statutes of Limitation), "so as to be chargeable in respect of, or by reason only of, payment of any principal, interest, or other money, by any other or others of such co-contractors or co-debtors, executors or administrators" (z).

(s) See Chitty on Contracts, 763, 764.

(t) *Morgan v Rowlands*, L. R. 7 Q. B. 493.

(u) Chitty on Contracts, 764.

(x) *Whitcombe v. Whiting*, 1 S. L. C. 642; Dougl. 652.

(y) 19 & 20 Vict. c. 97.

(z) Sect. 14.

Issuing of
process to
prevent
Statutes of
Limitation.

A writ may be issued before the period allowed by the statute has expired. Such writ of summons only remains in force for twelve months, but if not served it may by leave be renewed for six months and so on from time to time on its being shewn that reasonable efforts have been made to serve it, or for other good reason; and any writ of summons so renewed will remain in force for and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes from the date of the issuing of the original writ of summons. The production of a writ of summons purporting to be marked with the seal of the Court, shewing the same to have been renewed, is sufficient evidence of its having been so renewed and of the commencement of the action (a).

2. Set-off.

Set-off is a demand which the defendant in an action sets up against the plaintiff's demand, so as to counterbalance that of the plaintiff either altogether or in part. As, if the plaintiff sues for £50 due on a note of hand, the defendant may set off a sum due to himself from the plaintiff for merchandise sold to the plaintiff; and if he pleads such set-off in reduction of the plaintiff's claim, such plea is termed a plea of set-off. A set-off may therefore be defined as a claim which a defendant has upon a plaintiff, and which he sets up or places against the plaintiff's demand (b).

Former rules
as to set-off.

Before any statute upon the subject a defendant was not allowed to set off any claim he had against the plaintiff unless it was strictly connected with the plaintiff's demand, so that, for instance, if the defendant had simply some independent counter-debt against the plaintiff, he must have brought a cross action to recover it, but in an action for money received by him he might have set off any deduction he was entitled to make out of such sums by way of commission or otherwise (c).

(a) Judicature Act, 1875, Order VIII. rr. 1, 2.

(b) Brown's Law Dict. 328.

(c) See hereon generally, Chitty on Contracts, 772-791.

In equity the rule was somewhat different, being much more extensive, for there whenever there was some mutual credit between the parties set-off was allowed (*d*). However by the Statutes of Set-off (*e*) all mutual debts were allowed to be set off, and this even although such debts were of a different nature. But under the Statutes of Set-off only *debts* were allowed to be set off, and so the law has remained until quite lately, when upon this point it received a very great extension, it being provided by the Judicature Act, 1875 (*f*), that “a defendant in an action may set off or set up by way of counter-claim against the claims of the plaintiff any right or claim, *whether such set-off or counter-claim sound in damages or not*, and such set-off or counter-claim shall have the same effect as a statement of claim in a cross action, so as to enable the Court to pronounce a final judgment in the same action both on the original and on the cross claim. But the Court or a judge may, on the application of the plaintiff before trial, if in the opinion of the Court or judge such set-off or counter-claim cannot be conveniently disposed of in the pending action or ought not to be allowed, refuse permission to the defendant to avail himself thereof.” The student will observe that the great alteration and extension of the principle of set-off that is made by this last provision is, that anything, even a mere claim sounding in damages, may be set off, whereas formerly it must have been liquidated, or of such a nature as might be rendered liquidated, without an actual verdict to liquidate it. An instance of a case in which the Court would probably refuse to allow a defendant to avail himself of a set-off, would be an action of debt, and the defendant attempting to set off a claim against the plaintiff for an assault committed by him (*g*).

Provision of
Judicature
Act, 1875.

(*d*) See generally as to set-off, Snell's Principles of Equity, 512-517.

(*e*) 2 Geo. 2, c. 22; 8 Geo. 2, c. 24.

(*f*) 38 & 39 Vict. c. 77, Order XIX. r. 3.

(*g*) However in practice since the commencement of the new Acts counter-claims of almost every kind have been allowed. See Griffith's Judicature Acts, 554-557.

*George v.
Clagett.*

To entitle a defendant to set off a claim against a plaintiff it must of course be a claim that he has against the person who is suing him; but to this rule there is one exception, which has in a previous chapter been touched upon (*h*). That exception is in the case of a factor selling goods, and the buyer not knowing at the time that he is a factor, but believing him to be the actual owner of the goods; here if the principal afterwards declares himself (as he may do) and sues the buyer for the price of the goods, the buyer has the same right of set-off he would have had, had the action been brought not by the principal, but by the factor himself (*i*). And this rule is founded upon principles of natural equity (*k*).

Though not strictly coming under the head of set-off, it may be useful to here notice that the Judicature Act, 1875 (*l*), contains provisions whereby if a defendant has any claim in connection with the subject-matter of the action against some person not a party to it, such third person may be brought in, and the matter determined in the same action (*m*).

3. Release.

By release, as applied to contracts, is meant some act which operates as an extinguishment of a person's liability on a contract, and it may occur either expressly, where the contractee expressly exonerates or discharges the contractor from his liability, or impliedly, where the same effect takes place by the act of the law. An express release may be by an instrument under seal, in which case no consideration is necessary to its validity and effect, or provided there be a valuable consideration for the release, it need not be under seal, provided it is made before breach, and also provided the original contract was not under seal; if it was under seal, then

(*h*) See *ante*, pp. 113, 114.

(*i*) *George v. Clagett*, 2 S. L. C. 118; 7 T. R. 359.

(*k*) See 2 S. L. C. 120.

(*l*) 38 & 39 Vict. c. 77, Order XVI. r. 18, and Order XXII. r. 5.

(*m*) Indermaur's Manual of Practice, 23.

it can only be discharged by a release under seal. After breach, too, a release must be under seal, unless being founded on a valuable consideration it can operate, as it may possibly do, as an accord and satisfaction (n). A contract of record may be discharged by a release under seal (o).

A release can only generally operate to discharge the liability of the person to whom the release is given, but in the case of several joint contractors a release given to one will operate to discharge all, the reason of which is apparent, for if it did not so operate the effect would be that any co-contractor from whom the amount was recovered would have a right over for contribution against the one released, so that the release would really be without effect (p).

A release given to one of several joint contractors discharges all.

Although one of two joint creditors can give a release, yet a covenant not to sue given by one of two joint creditors does not so operate, and cannot be set up as a defence to an action brought by both (q).

Covenant not to sue by one of two joint creditors is no defence to an action brought by the two.

An instance of release by operation or implication of law occurred formerly in the case of a creditor appointing his debtor executor of his will and dying, for here as he as executor is the person entitled to receive the debts, and the debt is due from himself, and he cannot sue himself, the debt was at law gone. But in equity he would have been a trustee for the benefit of the persons entitled under the will, or the next of kin, and it is now provided by the Judicature Act, 1873 (r), that where there is any variance between the rules of law and equity, the rules of equity shall prevail. Another instance of release by operation of law,

Effect of a creditor appointing his debtor executor.

Or of a woman marrying her creditor.

(n) As to which, see *ante*, pp. 207, 208.

(o) Chitty on Contracts, 708.

(p) Chitty on Contracts, 712.

(q) *Walmsley v. Cooper*, 11 A. & E. 221.

(r) 36 & 37 Vict. c. 66, s. 25 (11).

which may occur now, is in the case of a woman marrying a person to whom she is indebted; but in equity any such debt might always have been kept alive by the agreement of the parties prior to marriage by way of settlement, and the same provision in the Judicature Act applies here.

Or of alteration of an instrument.

A further instance of release by operation of law is found in the case of the material alteration of written instruments after execution, which has been before discussed (s).

4. Bankruptcy, liquidation, and composition.

Bankruptcy Act, 1869.

When a bankrupt gets his discharge.

Bankruptcy, liquidation, and composition are courses taken against or by a debtor who is unable to pay his debts, on the creditors' part to get an equal distribution of his assets, and on his part to get a discharge from his debts. The Act now governing this subject is the Bankruptcy Act, 1869 (t), and under that Act, when a person has committed one of the acts of bankruptcy therein specified (u), and whether he is a trader or non-trader, a petition in bankruptcy may be presented against him by a creditor whose debt is not less than £50, or by several creditors whose debts together make up that sum, and on such petition he may be adjudicated a bankrupt. A trustee of his estate and effects is then appointed, together with a committee of inspection to superintend the trustee, and his estate is got in, and dividends paid to the creditors. The bankrupt is not at once by the bankruptcy discharged from his debts, but an order of discharge is only granted to him when a dividend of not less than 10s. in the pound has been paid to the creditors, or might have been paid, except through the negligence or fraud of the trustee, or when a special resolution of his creditors has been passed to the effect that his bankruptcy or failure to pay 10s. in

(s) See *ante*, pp. 137, 138.

(t) 32 & 33 Vict. c. 71.

(u) See sect. 6.

the pound arose in their opinion from circumstances for which he cannot be justly held responsible, and that they desire that an order of discharge should be granted to him (*x*). This order of discharge forms a valid excuse for the non-performance of his contracts, unless incurred by fraud, or forbearance thereof obtained by fraud, or unless in respect of any breach of trust; and even immediately the bankruptcy has commenced the Court of Bankruptcy has power to restrain proceedings against him (*y*). If the bankrupt does not at the close of his bankruptcy obtain his order of discharge, then after a lapse of three years debts can be enforced against him by the sanction of the Court of Bankruptcy (subject to other debts incurred since), and such debts are considered in the nature of judgment debts (*z*).

When a debtor feels himself involved, and no creditor has presented a petition in bankruptcy against him, his proper course is to file a petition for liquidation by arrangement or composition with his creditors. A meeting of his creditors then takes place, and the creditors can, by special resolution as defined by the Act (*a*), determine that his affairs shall be liquidated by arrangement, in which case a trustee and committee of inspection may be appointed, and the proceedings, including the discharge, are very much the same as in bankruptcy; or they may, by extraordinary resolution as defined by the Act (*b*), determine to accept some composition offered by the debtor in discharge, payment of which composition will bind all creditors, and discharge the debtor (*c*).

When liquidation and composition proceedings discharge a debtor.

(*x*) 32 & 33 Vict. c. 71, sect. 48.

(*y*) Sect. 13.

(*z*) Sect. 54.

(*a*) Sect. 16.

(*b*) Sect. 126.

(*c*) See hereon, sects. 125, 126. On the subject of bankruptcy generally, for the attainment of a fair elementary knowledge, the student is recommended to peruse Ringwood's Principles of Bankruptcy.

5. Incompetency of the party.

Incompetency of the party to contract, he being under some disability, may frequently form a good excuse for the non-performance of a contract. The different disabilities have already been discussed as fully as the scope of the present work will admit of (*d*).

6. Fraud or illegality.

Fraud or illegality in a contract may also form a valid excuse for its non-performance, and this subject is considered in our next chapter (*e*).

Equitable defences.

Common Law Procedure Act, 1854.

In concluding the present chapter, it may be well to say a few words on the subject of equitable defences. It has frequently happened that on an action at law being brought, the defendant has had some answer to the plaintiff's claim which would be admitted as a defence in Chancery but not at law. In such case the only course open to a defendant was to apply to the Court of Chancery to restrain the action at law, and take the matter under its cognisance, which it would do, not indeed restraining the Court from exercising its jurisdiction, but acting *in personam*, and restraining the plaintiff at law from further proceeding with his action. This state of things was to some extent remedied by a provision in the Common Law Procedure Act, 1854 (*f*), that where a person would be entitled to relief on equitable grounds he might plead the facts in his defence, stating expressly that it was a plea upon equitable grounds (*g*); but the courts of law on this enactment decided that they could only allow an equitable defence to be set up where an absolute and unconditional perpetual injunction would be granted in equity (*h*), so that there were still very many cases of

(*d*) *Ante*, ch. vii. p. 174 *et seq.*

(*e*) *Post*, ch. ix. p. 225 *et seq.*

(*f*) 17 & 18 Vict. c. 125.

(*g*) Sect. 83.

(*h*) *Woodhouse v. Farebrother*, 5 E. & B. 277; *Wakley v. Froggat*, 2 H. & C. 669.

equitable defences which could not be set up at law as excuses for the non-performance of contracts. The Judicature Act, 1873 (i), however, now remedies this, for, as it unites the former courts into one, so also it contains provisions giving generally equal jurisdiction to all the different divisions of that one court, and providing that where the rules of equity and law clash the rules of equity shall prevail. Particularly as to equitable defences it provides (k), that where any plaintiff or defendant claims to be entitled to any relief on equitable grounds only, which theretofore could only have been given by the Court of Chancery, the Supreme Court of Judicature, and every judge thereof, shall give the same relief in respect of, and the same effect to such equitable defence as ought formerly to have been given by the Court of Chancery. All equitable estates, rights and titles, and all equitable duties and liabilities appearing incidentally in the course of any cause or matter, are to be taken notice of and recognised as they formerly would have been by the Court of Chancery; and no action pending before the said court is to be restrained by way of prohibition or injunction (l).

If a person pays money in performance of some contract under compulsion of legal process, and afterwards he discovers that it was not due, *e.g.*, in the case of an action brought to recover money, and the defendant in such action being unable to find the receipt for it, or prove the payment of it without such receipt, has to pay it over again, but subsequently finds the receipt, here he cannot recover the amount so paid back again (m).

Money paid under compulsion of legal process cannot afterwards be recovered back as money had and received.

(i) 36 & 37 Vict. c. 66.

(k) Sect. 24.

(l) See hereon, Griffith's Judicature Acts, 22-34.

(m) *Marriott v. Hampton*, 2 S. L. C. 421; 7 T. R. 269; *Cadaval v. Collins*, 4 A. & E. 866.

When the property in goods has once passed to a person he must perform his part of the contract by paying for them though destroyed.

If a person purchases a specific chattel in which the property passes to him, although it may afterwards be destroyed by fire or other inevitable accident before delivery to him, he is still bound just the same to pay for it (n).

(n) *Tarling v. Baxter*, Tudor's Mercantile Cases, 596. See as to the Property in Goods passing, *ante*, pp. 70-74.

CHAPTER IX.

OF FRAUD AND ILLEGALITY.

IN this chapter it is proposed to consider generally what will amount to fraud, and when a contract will be illegal; the effect of fraud and illegality on a contract; and also some particular cases.

1stly. *As to Fraud*.—Fraud in law may be defined I. *As to fraud.* as some act, statement, or representation contrary to fact, whereby a person is induced to contract (*o*); and, as decided by the leading case of *Pasley v. Freeman* (*p*), *Pasley v. Freeman.* in the case of a false affirmation, to render it a fraud, it is not at all necessary to shew that the person making it was benefited by the deceit, or that he colluded with the person who was benefited.

Fraud may be divided as of two kinds: (1) Legal fraud, which consists in some false representation, but made without any knowledge of its falsity, and without any dishonest intentions; and (2) Moral fraud, which consists in there being a representation with knowledge of its falsity, or without actual belief in its truth, and with dishonest intention. A question that

Fraud may
be of two
kinds, legal
or moral.

(*o*) Numerous definitions of fraud have, however, from time to time been given (see several given in Brown's Law Dict. 161), and it is an undoubtedly difficult matter to accurately define. Courts of equity have refused to define fraud, considering that the ways of fraud are infinite, and that new modes of fraud may constantly arise, and the rules of equity now (as has before been stated) prevail in all divisions of the High Court of Justice (36 & 37 Vict. c. 66, s. 25 (11)).

(*p*) 2 S. L. C. 66; 3 T. R. 51.

It appears that legal without moral fraud is not sufficient.

Cornfoot v. Fowke.

has been very much discussed, and on which there has been considerable difference of opinion, is whether to constitute fraud to vitiate a contract it is necessary to shew moral as well as legal fraud, or whether mere legal fraud by itself is sufficient. It appears however to be now law, according to the weight of authority, that legal without moral fraud is *not* sufficient, but that moral fraud in a representation is essential to invalidate a contract or give any cause of action (*q*). The difference between legal and moral fraud may be illustrated by reference to the facts in the case of *Cornfoot v. Fowke*, cited below. In that case, the plaintiff being the owner of a furnished house, instructed his agent to let it, he well knowing that in the house next door existed a nuisance that might prevent the house being let, but the agent being ignorant of this fact. The agent let the house to the defendant, answering him in the negative when he inquired whether there was anything against the house. The defendant subsequently found out the objection to the house, and on this action being brought against him on the contract he had entered into with the agent, set up the fraud as a defence. But it was decided here that this was not a good defence, for the plaintiff had not instructed his agent to make the false representation, and the agent honestly made a representation that he believed to be true. This, therefore, was legal fraud; but had the representation been made by the plaintiff himself, or had he instructed his agent to make this representation, then moral fraud would have been imported into the transaction, and a clear defence would have existed.

But a principal may be liable in some cases for the false representation of an agent though the agent believed it to be true.

But it must not be understood absolutely from the above case of *Cornfoot v. Fowke* that a principal is not ever liable for the false representation of his agent,

(*q*) *Cornfoot v. Fowke*, 6 M. & W. 358; *Erans v. Collins*, Ex. Ch. 5 Q. B. 820; *Bailey v. Walford*, 15 L. J. (Q.B.) 369. See this subject discussed in 2 S. L. C. 86-94.

simply because the agent believed in its truth, for in that case it was admitted that if the plaintiff had employed an ignorant agent for the express purpose of concealing some fact as to the property, he would have been liable for the fraud; and there may be many cases where, from the conduct of the principal, moral fraud may be taken to exist (r).

If an agent in the course of his employment makes some representation known to him to be false, but which representation is unknown to the principal and not in any way sanctioned by him, but yet comes within the scope of the agent's authority, the principal is liable for the fraud (s).

A principal is liable for the moral fraud of his agent.

A mere lie is not sufficient to constitute fraud, nor is a false representation sufficient to found an action on it, unless it has caused some damage to the party to whom it is made; nor is a false representation sufficient to avoid a contract, unless thereby the defendant has been induced to enter into the contract (t).

What representation will not be sufficient to constitute a fraud.

In the case of breach of warranty, it has before been pointed out that it is different from an actual fraudulent representation (u); and this difference it is important to note, for in the case of a false representation, as has been shewn, it is generally necessary to shew the knowledge of its falsity, but for the breach of a warranty a person is liable without alleging or shewing any such knowledge on his part.

Difference between a warranty and a false representation.

If a person interests himself to procure credit for another, or is applied to and inquired of as to a person's

Representations concerning the credit of another must always be in writing.

(r) See remarks of Lord St. Leonards in *National Exchange Company of Glasgow v. Drew*, 2 Macq. H. of L. Cas. 103.

(s) *Udell v. Atherton*, 7 H. & N. 172; *Barwick v. English and Joint Stock Bank*, L. R. 2 Ex. 259. See also *Weir v. Bell*, L. R. 3 Ex. Div. 238; *Betts v. De Vitre*, L. R. 3 Ch. 429.

(t) *Broom's Coms.* 339.

(u) See *ante*, p. 84.

position, and makes some false representation in reply thereto, whereby the inquirer is induced to give credit to the third person, he is liable to an action in respect of the fraud contained in such false representation. But by Lord Tenterden's Act (x) it is provided "that no action shall be maintained whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon (y), unless such representation or assurance be made in writing signed by the party to be charged therewith."

13 Eliz. c. 5.

By Statute 13 Eliz. c. 5, "An Act against Fraudulent Deeds, Gifts Alienations, &c.," it is provided that all gifts, grants, conveyances, &c., of every kind of property, by writing or otherwise, made for the purpose of delaying, hindering, or defrauding creditors and others of their just and lawful actions, suits, debts, &c., shall be clearly and utterly void and of no effect as against such creditors and others, except made upon good (which means valuable) consideration to a person *bonâ fide* not having notice of the fraud. It will be observed that this statute applies to conveyances of all kinds of property whether real or personal. The leading case on the construction of the statute is *Twynne's case* (z), in which a gift of goods was held to be fraudulent on the following grounds :

1. The gift was perfectly general.

2. The donor continued in possession after the gift.

(x) 9 Geo. 4, c. 14, s. 6.

(y) This is as it is in the Act, but it is evidently a misprint in it, and should be read "money or goods upon credit."

(z) 1 S. L. C. 1 ; 3 Coke, 80.

3. It was made in secret.

4. It was made pending the writ.

5. There was a trust between the parties, and fraud is always clothed with a trust.

6. The deed of gift stated that the gift was honestly and truly made, which was an inconsistent clause.

The above are therefore points to look to in any gift or conveyance of property to determine whether or not it is fraudulent within the above Act, and particular attention should be paid to the point above numbered 2, for under it at the present day, should an absolute bill of sale be made, and the person giving it yet continues in possession of his goods, this will be an index of fraud (*a*), and therefore in framing a bill of sale, if it is intended that the giver of it should still continue in possession of the goods, it is important to make his continuing in possession consistent with the terms of the bill of sale (*b*).

If a person makes a voluntary settlement of his property whereby the assets of creditors, whether creditors then or subsequently, is subtracted so as not to leave sufficient for creditors, the law presumes an intention to defeat and delay creditors so as to bring the case within the statute (*c*).

Although a conveyance may be fraudulent under the above statute as against creditors, yet as between the parties themselves it is good.

By 27 Eliz. c. 4, all voluntary conveyances of land 27 Eliz. c. 4.

(*a*) *Edwards v. Harben*, 2 T. R. 587.

(*b*) *Martindale v. Booth*, 3 B. & Ad. 498, and cases there cited; 2 *Prideaux's Conveyancing*.

(*c*) *Spirett v. Willows*, 34 L. J. Ch. 367; *Freeman v. Pope*, L. R. 5 Ch. 538. And see generally hereon, *Snell's Principles of Equity*, 80-83.

are rendered fraudulent and void against subsequent purchasers for value, and this even although the subsequent purchaser may have notice of the first voluntary conveyance (*d*). This statute has no application to purely personal property, and with regard to leaseholds recent decisions are to the effect that where there is any rent, or there are any onerous covenants in the lease, the person taking—by reason of the liability he incurs on the same—cannot be considered as a volunteer, and that in such a case the voluntary settlement would be good against the subsequent purchaser (*e*).

Ex dolo malo non oritur actio.

But third persons may acquire an interest.

A rescission of a contract on the ground of fraud must be exercised within a reasonable time.

As to the effect of fraud on a contract, the maxim is, *Ex dolo malo non oritur actio* (*f*), but, notwithstanding this, the effect of fraud is not to altogether vitiate a contract, but the person on whom the fraud is practised has a right to insist on the fraud as preventing any right of action that would, but for it, exist, or he may if he choose waive the fraud and ratify and confirm the contract (*g*). And although as a contract originally stands, if induced by fraud, the party guilty of the fraud cannot enforce it, yet if third persons acquire a *bonâ fide* interest under it without any notice of the fraud, they will have a right to enforce it even against the party on whom the fraud has been practised (*h*).

But where there has been fraud, and a person has therefore a right of rescinding the contract, he must exercise this right within a reasonable time (*i*), and if knowing of the fraud he does not rescind the contract, but continues to act in it as if there were no fraud, he will lose his right.

(*d*) See generally hereon, Snell's Principles of Equity, 83–87.

(*e*) *Price v. Jenkins*, L. R. 4 Ch. Div. 483; *Ex parte Hillman*, 10 Ch. Div. 622.

(*f*) See Broom's Legal Maxims, 729 *et seq.*

(*g*) *White v. Garden*, 10 C. B. 919, 927; *Stevenson v. Newnham*, 13 C. B. 285.

(*h*) *Oakes v. Turquand*, L. R. 2 H. L. C. 325.

(*i*) *Ibid.*

There may be, however, many cases in which a false representation is made innocently, the party making it not knowing of its falsity, and here, unless a case of warranty can be made out, the person who is misled will have no rights in respect of such misrepresentation. For instance, if a horse is sold and represented by the vendor to be sound, if the vendor knows the animal is not sound, and by this representation the other party is induced to purchase the animal, this gives the latter a right to avoid the contract quite irrespective of any warranty as to the soundness of the animal; but if the vendor really believes that the horse is sound, here there is no fraud, and the misrepresentation gives the purchaser no rights unless he can make out that the vendor actually warranted the animal to be sound (*k*).

A person is not liable for his false representation if he believed such representation to be true.

And if there is fraud it is not necessary to shew that the fraud goes to the whole of the contract; it is quite sufficient to shew that there is a fraudulent misrepresentation as to any part of that which induced the person to enter into the contract (*l*).

Fraud need not go to the whole of the contract.

If a person comes to the Court to set aside a contract on the ground of fraud, and it appears that he also on his part has been guilty of fraud, so that both parties are really and truly *in pari delicto*, the Court will not give relief, for the maxim is, *In pari delicto potior est conditio defendentis et possidentis*, unless, indeed, public policy will be more promoted by giving relief (*m*).

Application of the maxim *In pari delicto*, &c.

2ndly. *As to Illegality*.—Primarily speaking, parties are allowed to enter into any contracts that they think fit, and by their contracts to make laws for themselves to a certain extent, but there are many kinds of contracts which are not allowed because the interests of

II. As to illegality.

(*k*) Per Blackburn, J., *Kennedy v. Panama Mail Co.*, L. R. 2 Q. B. 587.

(*l*) Ibid.

(*m*) Story's Equity, 298, 303; Snell's Principles of Equity, 468.

the public or of morality are affected thereby, and public injury might be done were they allowed (n). Where then there is illegality the contract is void, and in the words of Lord Chief Justice Wilmot, in the important case of *Collins v. Blantern* (o), "the reason why such contracts are void is for the public good. You shall not stipulate for iniquity . . . no polluted hand shall touch the pure fountain of justice. Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a court to fetch it back again; you shall not have a right of action when you come into a court of justice in this unclean manner to recover it back again."

But, notwithstanding this dictum, if of two parties to an illegal contract one is not actually *in pari delicto* with the other, or there is some excuse for him, he may obtain relief from the contract; and even although the parties are in equal guilt, yet if public policy will be thereby promoted the contract will be relieved against in equity, on the ground of its being for the benefit of the public (p).

The doctrine of estoppel does not prevent the setting up of illegality.

Collins v. Blantern.

Although an instrument on its face may appear to be perfectly valid, yet parol evidence may be given to shew that it is actually an illegal contract, and this even although it be a contract under seal. This is well shewn by the important case of *Collins v. Blantern* (q), which has been referred to, and the facts in which have been set out at a previous page (and to which the student is referred (r)). In that case also the Lord Chief Justice Wilmot in his judgment said, "What strange absurdity would it be for the law to say that

(n) Chitty on Contracts, 607.

(o) 1 S. L. C. 387.

(p) Story's Equity, 298, 303; Snell's Principles of Equity, 468, and cases there cited.

(q) 1 S. L. C. 387; 2 Wilson, 341.

(r) See *ante*, pp. 14, 15.

this contract is wicked and void, and in the same breath for the law to say, you shall not be permitted to plead the facts which clearly shew it to be wicked and void " (s).

But it must be carefully remembered that the law never presumes illegality, but rather presumes every contract to be good until the contrary is shewn, for one of the maxims for the construction of contracts is, that the construction shall be favourable (t); and it may sometimes happen that some only of the covenants or conditions in a deed may be void as being illegal, and that the others may be good, but here the illegal covenants must be clearly divisible from the others (u).

The law never presumes illegality.

Illegality is usually said to be of two kinds viz., 1. Where the illegality consists in some act which is illegal by the common law of the realm, as being against public policy or morality, and acts of this kind are also said to be *mala in se*; and 2. Where the illegality consists of some act which was not originally illegal but has been rendered so by some statutory provision, and acts of this kind are also said to be *mala prohibita* (x). We will, therefore, firstly, proceed to notice some kinds of contracts illegal under the first of the above divisions, viz., at Common Law.

Illegality is of two kinds.

A contract in general restraint of trade is absolutely void—that is to say, no person, for however valuable a consideration, can covenant absolutely never again to carry on his trade or calling anywhere, for any such agreement is considered to be contrary to public policy as tending to cramp trade and to discourage industry, enterprise, and competition. But it will be observed that in the rule above given the words are “in

Matters *mala in se*.

Contracts in restraint of trade.

(s) 1 S. L. C. 395.

(t) See *ante*, p. 21.

(u) Chitty on Contracts, 608.

(x) See this division in 1 S. L. C. 389; and Chitty on Contracts, 607 *et seq.*

general restraint of trade," and it is perfectly valid for a person *for consideration* to enter into a contract in limited restraint of trade, which may often be very necessary for a person's proper protection ; thus, if one sells the goodwill of a business, and nothing is said restricting his carrying on a like business in or near that place, he is at liberty the very next day to set up a like business, even next door, to the great injury of the purchaser. But this may be prevented by the vendor entering into a contract in limited restraint of trade.

*Mitchell v.
Reynolds.*

Thus, in the well-known case of *Mitchell v. Reynolds* (y), the facts were that the plaintiff and defendant being by trade bakers, the defendant had assigned to the plaintiff a lease of his bakehouse situate in the parish of St. Andrew, Holborn, for the term of five years, and the defendant had executed a bond not to carry on the trade of a baker *within that parish* during the said term of five years, or, if he did, that he would pay to the plaintiff a sum of £50. The defendant having committed a breach of his covenant, this action was brought to recover the £50 on the bond, and the defendant objected that the bond was illegal, for he was a baker by trade, and the bond operated in restraint of trade ; but the Court held that though covenants in general restraint of trade were utterly invalid, as being contrary to public policy, yet a contract in reasonable limited restraint of trade is perfectly valid, and that here the restraint was perfectly reasonable, being indeed both for a limited space of time, and in respect only of one particular parish. Lord Chief Justice Parker, in concluding his judgment, said, " In all restraints of trade, where nothing more appears, the law presumes them bad ; but if the circumstances are set forth that presumption is excluded, and the Court is to judge of those circumstances and determine accordingly ; and if

(y) 1 S. L. C. 417 ; 1 P. Wms. 181.

upon them it appears to be a just and honest contract, it ought to be maintained " (z).

The questions, therefore, in every contract operating in any way in restraint of trade must be two, viz. : 1. Is it in general restraint of trade ? (and if this question is answered affirmatively, it must be illegal and void) ; and 2. If in partial restraint of trade, is that partial restraint reasonable ? The question of its reasonableness must depend to a great extent on the circumstances of each particular case, for naturally some trades or callings may require a wider limit than others, and it is therefore impossible to lay down any fixed rule of when a restraint will be reasonable and when not (a). A good test, however, of whether any such covenant is good or bad is found in the words of Lord Chief Justice Tindal (b), who, in delivering judgment in the case cited below, said : " We do not see how a better test can be applied to the question whether this is or is not a reasonable restraint of trade, than by considering whether the restraint is such as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party requires, can be no benefit to either ; it can only be oppressive, and, if oppressive, it is in the eyes of the law unreasonable. Whatever is injurious to the interests of the public is void on the ground of public policy."

Two questions to be asked in considering whether a contract in restraint of trade is good.

Whether a restraint is reasonable depends upon the particular circumstances.

The limit that is required in a contract in restraint of trade to render it valid is a limit *in point of space* ; thus, in one case there was an apparently very reasonable covenant by a person that he should not, for nine

The limit that is essential in a contract in restraint of trade is a limit in point of space not time.

(z) 1 S. L. C. 431.

(a) See various instances of different limits in Chitty on Contracts, 615, 616. See also *Tallis v. Tallis*, 1 E. & B. 391 ; *Leather Cloth Co. v. Lonsont*, L. R. 9 Eq. 355 ; *Allsopp v. Wheatcroft*, L. R. 15 Eq. 59.

(b) In *Horner v. Graves*, 7 Bing. 744.

months after leaving the plaintiff's employment, carry on, follow, or be employed in a like business as that carried on by the plaintiff, and as there was no stipulation limiting it as to space, but it prohibited the defendant from acting in that business anywhere for that period, it was held void (*c*). But there does not appear to be any case deciding that there need be any limit in point of time, and it is submitted that there is no necessity for there to be any such limit, the great essential being that there should be a limit in point of *space* (*d*)

Such contracts must always be founded on a valuable consideration.

It is actually necessary that a contract in restraint of trade, to be good, should be founded upon a valuable consideration, even though under seal (*e*), and this forms an exception to the rule that a specialty contract requires no consideration. But it seems to be now decided that the Court will not enter into the question of whether the consideration is adequate, but that it will be sufficient if there is a consideration shewn to be of some *bonâ fide* legal value, but that if the consideration is so small as to be merely colorable, then it is not sufficient (*f*).

Part of the stipulations may be good and part bad.

Mallam v. May.

A contract in restraint of trade may sometimes be good in part and bad in part, and this is well shewn by the case of *Mallam v. May* (*g*). In that case it had been agreed between the plaintiffs and the defendant that the defendant should become assistant to the plaintiffs in their business of surgeon-dentists for four years;

(*c*) *Ward v. Byrne*, 5 M. & W. 548.

(*d*) In a case of *Mumford v. Gething*, 7 C. B. (N.S.) 317, Byles, J., asked, "Do you find any case shewing that the absence of a limitation in point of time would make the agreement bad where the restraint is not too large in point of space?" and he was not referred to any such case. The case of *Wickens v. Evans*, 3 Y. & J. 318, tends, however, to shew that the law is as submitted in the text above.

(*e*) *Mitchell v. Reynolds*, 1 S. L. C. 417; 1 P. Wms. 181.

(*f*) *Hitchcock v. Cohen* (in Cam. Scac.), 6 A. & E. 438; *Archcr v. Marsh*, 6 A. & E. 966; *Pilkington v. Scott*, 15 M. & W. 657.

(*g*) 11 M. & W. 653.

that the plaintiffs should instruct him in the business of a surgeon-dentist, and that after the expiration of the term the defendant should not carry on that business *in London, or in any of the towns or places where the plaintiffs might have been practising before the expiration of the said service*. On breach of the covenant, and action being brought thereon, it was held by the Court that the stipulation not to practise *in London* was valid, the limit of London not being too large for the profession in question, but that the stipulation as to not practising in towns where the plaintiffs might have been practising was an unreasonable restriction, and therefore illegal and void; and that the stipulation as to not practising in London was not affected by the illegality of the other part (*h*).

An agreement or combination of employers binding themselves only to employ workers at a certain rate of wages, or only to carry on their business in a certain specified way, is illegal, and no action lies on the breach of any such agreement (*i*). So also an agreement by employees to combine to increase the rate of wages cannot be enforced (*k*); but by the Trade Union Act, 1871 (*l*), it is provided that trade unions are not to be considered unlawful so as to render members thereof liable to be prosecuted, but agreements between members not to sell their goods or be employed are to be incapable of being enforced (*m*).

Of contracts of an immoral nature, and as such illegal and void, may be mentioned agreements in consideration of cohabitation or future seduction (*n*), or

(*h*) See also *Price v. Green*, 16 M. & W. 346.

(*i*) *Hilton v. Eckersley*, 6 E. & B. 47-66.

(*k*) *Walsby v. Anley*, 3 El. & El. 516.

(*l*) 34 & 35 Vict. c. 31.

(*m*) Sects. 2-4.

(*n*) A contract to pay a sum in consideration of *past* seduction is not illegal, but it would afford no consideration to support a simple contract: *Beaumont v. Reeve*, 8 Q. B. 483; *ante*, p. 35.

the letting of lodgings for the direct purpose of prostitution.

Restraint of marriage.

Contracts which operate in general restraint of marriage are illegal and void.

Contracts involving maintenance and champerty are also illegal and void.

Maintenance.

Maintenance may be defined as an offence which consists in officiously intermeddling in a suit that in no way belongs to one, as by maintaining or assisting either party with money or otherwise, although having nothing to do with it (*o*). Probably, however, at the present day, the offence of maintenance is obsolete, there being numerous and very wide exceptions.

Champerty.

Champerty consists in an agreement between a litigant and a third party, whereby in consideration of that third party advancing him money he agrees to share with him the proceeds of the litigation. It may be noticed that the Attorneys and Solicitors Act, 1870 (*p*), specially guards against champerty, in the case of solicitors, by providing (*q*) that "nothing in this Act contained shall be construed to give validity to any purchase by an attorney or solicitor of the interest of his client in any suit, action, or other contentious proceeding to be brought or maintained, or to give validity to any agreement by which an attorney or solicitor retained or employed to prosecute any suit or action stipulates for payment only in the event of success in such suit, action, or proceeding."

All contracts for the compromise of criminal offences, or to interfere with the course of justice, are illegal and void.

(*o*) Brown's Law Dict. 224.

(*p*) 33 & 34 Vict. c. 28; see *ante*, p. 162.

(*q*) Sect. 11.

So also are contracts for *future* separation.

We will now consider some contracts which are rendered illegal by reason of some statutory provision. Matters *mala prohibita*.

Gaming and wagering contracts are illegal and void, Gaming contracts. being prohibited by statute. At common law, however, such contracts were valid unless of such a nature as to contravene public policy, as, for instance, if tending to the injury or annoyance of others, or to outrage decency (*r*). Various statutes have, however, been passed from time to time prohibiting gaming and wagering contracts, and the statute now in force on the subject, 8 & 9 Vict. c. 109, provides (*s*) “that all contracts or agreements whether by parol or in writing by way of gaming or wagering shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to have been won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made; provided always that this enactment shall not be deemed to apply to any subscription, or contribution, or agreement to subscribe or contribute for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise.” 8 & 9 Vict. c. 109.

It may often be a source of some difficulty to determine whether or no any particular contract is by way of gaming or wagering; thus although a security given for a gaming debt is void, or to be taken as given upon an illegal consideration (*t*), yet it has been held in a recent case that, where a person having lost bets gave Difficulty sometimes in ascertaining whether a contract is by way of wagering or gaming.

(*r*) See Broom's Coms. 355.

(*s*) Sect. 18.

(*t*) See *post*, p. 242, where it is stated that certain securities of this nature are not to be absolutely void, but only taken to be given on an illegal consideration.

*Bubb v.
Yelverton.*

a bond in respect of the amount to the parties to whom he had lost the money to prevent them taking proceedings before the Jockey Club and posting him as a defaulter, the bond was good, because there was a new consideration quite irrespective of the original bets, viz., the forbearing of such proceedings (u). If, however, it is clearly made out that a contract is a gaming or wagering contract, then it is absolutely null and void and incapable of being enforced.

Deposit with
a stakeholder
may be re-
covered before
actually paid
over.

*Hampden v.
Walsh.*

But if on a gaming contract a deposit is made with a person as stakeholder, here, before such deposit is actually paid over, the person so depositing it has a right to demand and recover it back again, for he has to this extent a *locus poenitentiae* (x). Both this point and also what will be held to be a gaming and wagering contract are well shewn by the recent case of *Hampden v. Walsh* (y), in which the facts were as follows: The plaintiff and one Wallace each deposited £500 in the defendant's hands as stakeholder, upon an agreement that if Wallace proved the convexity or curvature to and fro of any canal, river, or lake by actual measurement and demonstration to the satisfaction of certain referees, he should receive both sums, but that if he failed then the plaintiff should receive both. The experiment was made and decided by the referees in favour of Wallace and the defendant paid the whole £1000 over to him accordingly. Before, however, he had done so the plaintiff objected to the decision, and he afterwards brought this action to recover his own £500 deposit as money had and received by the defendant to his use, and it was held by the Court, (1) That the agreement was a wager, and so null and void within 8 & 9 Vict. c. 109, sect. 18; and (2) That the plain-

(u) *Bubb v. Yelverton*, L. R. 9 Eq. 471. See as to forbearance of proceedings constituting a consideration, *ante*, p. 31.

(x) *Varley v. Hickman*, 17 L. J. (C.P.) 102; *Martin v. Hewson*, 24 L. J. (Ex.) 174; *Diggle v. Higgs*, L. R. 2 Ex. Div. 422.

(y) L. R. 1 Q. B. Div. 189.

tiff was entitled to recover on the ground that that provision does not apply to an action by a person to recover his own deposit, and he had here revoked the authority of the stakeholder before he had paid over the money.

If, however, a stakeholder on any gaming contract pays the money over to the winner with the express or implied assent of the other party, then he is discharged from any further liability (z). No action will lie against a stakeholder by the winner on a gaming contract for the whole of the amount, for he is not by the fact of the winning converted into an agent for the winner for anything beyond what he originally was, viz., the amount of his own deposit (a). But this does not extend beyond the stakeholder, and if he pays over the whole amount to some third person for the use of the winner, then the winner can recover it from such third person, who cannot on his part set up the original illegality of the transaction, for there is a new contract which does not necessitate any reference to the original illegality (b).

As to the position of a stakeholder.

It will be noticed that the latter part of the sect. 18 of 8 & 9 Vict. c. 109, contains a proviso that the enactment shall not extend to any subscription or contribution or agreement for the same towards any plate, prize, or sum of money to be awarded to the winner or winners of any *lawful* game, pastime, or exercise. It appears that all games of skill, such as chess and the like, are lawful games within this proviso (c). It has however been held that an agreement between two persons for a wager is void within the statute, and the deposit of the money by the parties is not a subscription or

What is a lawful game within sect. 18 of 8 & 9 Vict. c. 109.

(z) *Howson v. Hancock*, 8 T. R. 575.

(a) *Allport v. Nutt*, 1 C. B. 974.

(b) *Simpson v. Bloss*, 7 Taunt. 246.

(c) See Chitty on Contracts, 644, 645, and cases there cited and referred to. Instances of other kinds of games which would probably be held lawful are also mentioned there.

contribution for a sum of money to be awarded the winner within the proviso of that enactment, and although the winner of the match cannot sue the loser or stakeholder to recover the stakes, yet he may bring an action to recover back the share deposited by him with the stakeholder (*d*).

Horse-racing. Horse-racing is allowed on the principle that it tends to improve the breed of horses (*e*); but, of course, wagers on the result of such races are illegal and void.

Lotteries. Lotteries are rendered illegal by the provisions of the Lottery Acts (*f*).

Bills, notes, or mortgages, given for gaming debts are not void, but to be taken as upon an illegal consideration. Not only are actual contracts of gaming or wagering void themselves, but if money is lent to a person to game with, the purpose for which it is required being known at the time, it cannot be recovered back again (*g*); but if a bill of exchange, or promissory note, or mortgage is given to secure some debt won at gaming, it is not actually null and void, it being provided by statute (*h*) that such bills, notes, and mortgages shall not be absolutely void, but shall be deemed and taken to have been given or executed for an illegal consideration. The consequence of this is, that if any such security is transferred to a *bonâ fide* holder for value without notice of the illegality, he will have a right to recover thereon, although the person in whose hands the same originally was could not have done so. It is, however, provided by the same statute (*i*) that money paid to the holder of such securities shall be deemed to be paid on account of the person to whom the same

(*d*) *Diggle v. Higgs*, L. R. 2 Ex. Div. 422, overruling *Batty v. Marriott*, 5 C. B. 818.

(*e*) The statute on the subject is 18 Geo. 2, c. 34, and by 3 Vict. c. 5, provisions of 13 Geo. 2, c. 19, as to validity of horse-racing are repealed.

(*f*) 10 & 11 Wm. 3, c. 17, and 42 Geo. 3, c. 119.

(*g*) *M'Kinnell v. Robinson*, 3 M. & W. 434.

(*h*) 5 & 6 Wm. 4, c. 41, s. 1.

(*i*) Sect. 2.

was originally given, and shall be deemed to be a debt due and owing from such last-named person to the person who shall have paid such money, and shall accordingly be recoverable by action.

Any person insuring another's life must have an interest therein, or the policy will be illegal and void (*k*). Wager policies.

Simony is an offence which consists in the buying and selling of holy orders, and any bond or contract involving simony is illegal and void (*l*). Simony.

By the Lord's Day Act (*m*), it is provided that "no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary callings upon the Lord's Day, or any part thereof (works of necessity and charity only excepted); and that every person being of the age of fourteen years or upwards offending in the premises shall for every such offence forfeit the sum of five shillings." This statute is still in force, and under it contracts so entered into will be illegal and void, and no action can be maintained thereon; and it has been decided that if a person buys goods of a tradesman on a Sunday, although he keeps them after that day, yet that alone will not render him liable for the price (*n*). The Lord's Day Act.

Although this statute uses the words "or other person whatsoever," yet it does not extend to every person; but these general words must be taken to be limited by the particular words immediately preceding them, and it will only include persons coming within that class—that is, it will only include persons *ejusdem generis*. Rule of *ejusdem generis*.

(*k*) 14 Geo. 3, c. 48; *ante*, p. 156.

(*l*) See hereon, 31 Eliz. c. 6; 12 Anne, st. 2, c. 12; *Fox v. Bishop of Chester*, Tudor's Leading Cases, Conveyancing, 190; 6 Bing. 1.

(*m*) 29 Car. 2, c. 7, s. 1.

(*n*) *Simpson v. Nicholls*, 3 M. & W. 240.

generis. The provision also only applies to an act done in the way of one's ordinary calling, so that it will not apply to an act done by one of the persons within its provisions, but which act is not of the kind that he ordinarily does; thus, if a person who is a horse-dealer sells a horse on a Sunday and gives a warranty with it, no action lies against him on his warranty, but if he is not a person who usually deals in horses, but simply a private person selling a horse, it would be different, for the sale and the warranty are not in the course of his ordinary calling.

It has been decided under this statute that a person can commit but one offence on one Sunday by exercising his ordinary calling contrary to the statute; but this pertains to criminal law (o).

*Quod ab initio
non valet in
tractu temporis
non conualescit.*

Where an instrument is illegal, either by the common law or by statute, it cannot be afterwards confirmed, the maxim being, *Quod ab initio non valet in tractu temporis non conualescit.*

Effect of
not stamping
an instrument
within the
proper time.

The mere fact that an instrument which ought to have been stamped has not been stamped within the proper time, is not to render it illegal, but that it cannot be given in evidence until stamped; and it is the duty of the officer of the Court to call the attention of the Court to any want or insufficiency of a stamp (p). An ordinary agreement requires a stamp of 6d., and must be stamped within fourteen day of execution, or afterwards can only be stamped on payment of a penalty of £10, and if paid in court, a further penalty of £1. The following agreements, however, are exempted from stamp duty:

1. An agreement or memorandum, the matter whereof is not of the value of £5.

(o) *Crepps v. Durden*, 1 S. L. C. 711; Cowp. 640.

(p) 33 & 34 Vict. c. 97, s. 16.

2. An agreement or memorandum for the hire of any labourer, artificer, manufacturer, or menial servant.

3. An agreement, treaty, or memorandum made for or relating to the sale of any goods, wares, or merchandise.

4. An agreement or memorandum made between the master and mariners of any ship or vessel for wages on any voyage coastwise from port to port in the United Kingdom (*q*).

A cognovit or I.O.U. does not require stamping, unless it contains some special terms of agreement (*r*).

(*q*) 33 & 34 Vict. c. 97, tit. "Agreement."

(*r*) *Ames v. Hill*, 2 B. & P. 150; *Fisher v. Leslie*, 1 Esp. 426; Chitty on Contracts, 116; and see generally as to stamping agreements, Chitty on Contracts, 109-130.

PART II.

OF TORTS.

CHAPTER I.

OF TORTS GENERALLY.

Definition of
a tort.

A TORT may be defined as some wrongful act, consisting in the withholding or violating of some legal right (*s*), and the following are a few instances—under the divisions subsequently adopted—of torts in respect of which an action will lie :—

Instances of
torts.

1. Torts affecting land (*t*), such as,
Trespass to land ;
Waste ;
Nuisances.

2. Torts affecting goods and other personal property (*u*), such as,
Wrongful taking or detention of goods ;
Wrongful distress.

3. Torts affecting the person (*x*), such as,
Assault ;
Battery ;
Libel and Slander ;
Seduction.

(*s*) See Broom's Coms. 638.

(*t*) *Post*, ch. ii.

(*u*) *Post*, ch. iii.

(*x*) *Post*, chs. iv. and v.

4. Torts arising peculiarly from negligence (y),
such as,

Injuries by carriers to goods or passengers;
Injuries from negligent driving (z).

Now in all the above instances it must follow, that, as a person has a right to the due protection of his person and his property, both real and personal, that, these rights being infringed, he has a right of action in respect of the infringement, and all torts will be found to come in some way under one at least of the above heads.

But different torts might be enumerated almost without end, for they may be infinitely various in their nature, and it is impossible to lay down any fixed rule of what will or what will not amount to a tort for which an action will lie (a). It is no good ground of objection to an action that injury of such a kind has never been made the subject of any prior action, for provided it comes within any principle upon which the courts act, it is sufficient, although the instance may be new; but if it embraces some entirely new principle, and it is sought to make an act a tort which does not come within any former principle, then this can only be done by the interference of the legislature. This is expressed in the case of *Pasley v. Freeman* (b), by Ashurst, J., who says, "Where the cases are new in their principle, there I admit that it is necessary to have recourse to legislative interposition in order to remedy the grievance; but where the case is only new in the instance, and the only question is upon the application of a principle recognised in the law to such new case, it will be just as competent to courts of justice to apply the principle to any case that may arise two

Every tort
produces a
right of action.

The newness
of a tort is no
objection to
an action.

Remarks of
Ashurst, J.,
in *Pasley v.*
Freeman.

(y) *Post*, ch. vi.

(z) See hereon generally, Addison on Torts, ch. i.

(a) See *Ashby v. White*, 1 S. L. C. 264; Lord Raymond, 938.

(b) 2 S. L. C. 66; 3 T. R. 51.

Langridge v. Levy.

centuries hence, as it was two centuries ago." That this is so is well shewn by the case of *Langridge v. Levy* (c), which presents a highly novel instance of a tort. In that case the father of the plaintiff had bought a gun of the defendant, stating at the time of buying it that it was required for the use of himself and his sons, of whom the plaintiff was one, and the defendant gave him a warranty that it was made by a particular maker. The plaintiff used the gun and it burst and injured him, and it appearing that it was not made by the person named in the warranty, this action was brought for damages in respect of the breach of duty of the defendant, and it being proved that the defendant had knowingly made the false warranty, and that the gun had been used on the faith of that warranty, it was held that the defendant was liable for his deceit, and that the plaintiff was entitled to recover.

Injuria sine damno, and damnum sine injuria.

A tort may be committed although no actual injury is done by the tortious act, for if a person has what in the eyes of the law is considered as a legal right and that right is infringed, he has an action in respect of it, even though it has not hurt him, and this is said to be *injuria sine damno* (d). On the other hand, some substantial injury may be done to a person but yet he may have no right of action in respect of it, because although damage has been done to him, yet no legal right has been infringed and therefore no injury done to him in the eyes of the law, and this is said to be *damnum sine injuria* (e). This subject has already been somewhat considered at the pages referred to below.

Distinction
between torts
and crimes.

Some torts may amount to crimes, but many do not,

(c) 2 M. & W. 519; in error, 4 M. & W. 337.

(d) See *ante*, p. 4, and case of *Ashby v. White* there cited and referred to.

(e) See *ante*, p. 4, and case of *Acton v. Blundell* there cited and referred to. See also Addison on Torts, ch. i, s. 1.

and it is very important to properly understand the difference between mere torts and crimes. A tort has been already defined (*f*), and a crime may be described as some breach or violation of public rights, and the real distinction between an act which is simply and purely a tort, and an act which is not only a tort but also an actual crime, is that, whilst the tort is simply a wrong affecting the civil right of some particular person or persons, a crime affects the public rights, injuring the whole community (*g*).

It must, therefore, be apparent to every reader that there are many and numerous wrongful acts which, though amounting to torts, yet do not come within the category of crimes. Thus particularly may be enumerated torts arising from the negligence of one's servants or agents. If a coachman is driving his master's carriage in the ordinary course of his duty, and by his negligence he runs over a person, this is a tort for which the master may be liable in a civil action, but it is nothing more; there is no crime on the master's part. Again, a private nuisance—that is, a nuisance which does not affect the public at large, but simply some individual—is a tort but not a crime.

As to torts which do not amount to crimes.

But, on the other hand, many acts may not only be torts, but may also amount to actual crimes punishable by the criminal law; thus, in our first instance given above, we have it that the master has committed a tort, but no crime, but with regard to the coachman the case may be very different, for he may not only have been guilty of a tort but possibly also of a criminal offence amounting to manslaughter. So also if a nuisance is not merely a private but a public one—that is one affecting the public at large—this is an offence for which the person committing it is liable to be indicted.

As to torts amounting to crimes.

(*f*) *Ante*, p. 246.

(*g*) See Brown's Law Dict. p. 104, title "Crime."

Where a tort is also a crime the civil remedy is generally suspended until after prosecution.

When a tortious act is also a crime, and a crime of such a high nature as to amount to felony (*h*), the civil right which a person has to maintain an action for the injury done to him is suspended until the felony has been punished, for "the policy of the law requires that before the party injured by any felonious act can seek civil redress for it, the matter should be heard and disposed of before the proper criminal tribunal in order that the justice of the country may be first satisfied in respect of the public offence" (*i*). But when public justice has thus been satisfied there is generally nothing to prevent the injured party from suing in a civil action in respect of the tort.

Exceptions.

With respect, however, to some torts amounting to crimes, the injured party cannot take both civil and criminal proceedings; but these are cases in which, though the act does amount to a crime, yet it is to a certain extent a crime directly and particularly affecting the individual, and not the public at large. Thus, for an assault, where there is a criminal prosecution and there is also a civil action for damages pending, sentence will not be passed for the crime whilst such action is pending (*k*). It has also been provided that if the justices upon the hearing of any summary proceedings for assault or battery, upon the merits, shall deem the offence not proved or to be justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall forthwith make out a certificate under their hands stating the fact of such dismissal, and shall deliver such certificate to the party

24 & 25 Vict.
c. 100, ss. 44,
45.

(*h*) A felony at common law was an offence which occasioned forfeiture of a man's property, and was generally applied to a higher class of offences than comprised under the term "misdemeanor." Now, however, by various statutes, numerous offences have been classed indiscriminately as felonies and misdemeanors, and forfeiture for felony having by 33 & 34 Vict. c. 23, been abolished, the original distinctions between felonies and misdemeanors are now to a great extent gone.

(*i*) *Per* Lord Ellenborough, C.J., in *Crosby v. Leng*, 12 East, 413, cited in Broom's Coms. p. 106.

(*k*) *Reg. v. Mahon*, 4 A. & E. 575.

against whom the complaint was preferred (*l*); and that if any person against whom any such complaint shall have been preferred shall have obtained such a certificate, or having been convicted shall have paid the whole amount adjudged to be paid, or shall have suffered the imprisonment awarded, in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause (*m*).

The term "tort" is frequently used for the purpose of denoting a wrong or injury quite independent of contract (*n*); but in the definition at the commencement of the present chapter a wider application is given to it, viz., that it is some wrongful act which consists in the withholding or violating some legal right, and, as will be presently noticed, there are many torts in some way connected with contracts, and which are said to arise out of or flow from contracts. Before, however, proceeding to further notice this, it is important to have a correct appreciation of the difference between rights arising from breach of contract and rights arising from tort, using that term as signifying an injury independent of contract, for these are the more ordinary and usual kind of torts.

The term "tort" is used in contradistinction to "contract."

Where a person's right arises from a wrongful act independently of any contract, his action is styled an action *ex delicto*, but when arising strictly out of a contract it is called an action *ex contractu*, and in this latter kind it is necessary that there should be privity between the plaintiff and the defendant, for a person cannot sue upon a contract when there is no privity between himself and the party against whom he claims. Thus, if a person sends a message by a telegraphic company, and a mistake is made by the company in

Difference between torts arising from contracts and independently of contracts.

(*l*) 24 & 25 Vict. c. 100, s. 44.

(*m*) Ibid. s. 45.

(*n*) See it so defined in Brown's Law Dict. 362.

sending it, whereby he (the sender) is injured, here there is privity of contract between him and the company, and he has a right of action *ex contractu* against them. But if through the mistake an injury happens to the person to whom the message is sent, there being no privity of contract between him and the company—for he indeed made no contract with them—he can have no right of action against them *ex contractu* (o), though possibly he might have such a right *ex delicto*, on the ground of the company having been guilty of a tort, by reason of the breach of their proper duty. To support an action *ex contractu*, therefore, it is essential that there should be privity between the parties, but with regard to a tort—again using that term as signifying an injury arising independently of contract—the right of action has nothing to do with any privity between the parties, but it exists simply because of the withholding or violation of some right (p). That this is so is shewn by the case of *Langridge v. Levy*, the facts in which have been already stated (q).

There are many cases in which it may be in a person's election to sue for a tort or for breach of contract.

But there are many kinds of torts arising out of contract, being cases in which there has been a contract and a breach of that contract, which looked at in one way furnish a right of action *ex contractu*, and looked at in another way furnish a right of action *ex delicto*. Thus, in the case of *Langridge v. Levy*, before referred to (r), there was a valid contract of warranty of the gun to the father who bought it, and on a breach of that warranty as regarded him he might have brought an action *ex contractu*, but the actual fact in the case was that the breach happened as regarded the son, as to whom there was no privity of contract, he not having been in any way a party to the contract; but he was held entitled to succeed in an action *ex delicto*. The point we are at

(o) *Playford v. United Kingdom Telegraph Co.*, L. R. 4 Q. B. 706. Addison on Torts, 676.

(p) *Gerhard v. Bates*, 2 E. & B. 476; *Langridge v. Levy*, 2 M. & W. 519.

(q) *Ante*, p. 248.

(r) *Ibid.*

present considering is well explained by Mr. Broom in his Commentaries on the Common Law (s), and we cannot do better than quote the passage from that work: "... Although tort in general differs essentially from contract as the foundation of an action, it not unfrequently happens that a particular transaction admits of being regarded from two different points of view, so that when contemplated from one of these it presents all the characteristics of a good cause of action *ex contractu*, and when regarded from the other, it offers to the pleader's eye sufficient materials whereupon to found an action *ex delicto*. Thus, carriers warrant the transportation and delivery of goods entrusted to them. Attorneys, surgeons, and engineers undertake to discharge their duty with a reasonable amount of skill, and with integrity; and for any neglect or unskilfulness by individuals belonging to one of these professions, a party who has been injured thereby may maintain an action, *either in tort for the wrong done, or in contract, at his election (t)*.

And even in cases where the tort flows from contract, the rule that privity between the parties is not necessary, still applies (u). Privity is never necessary in torts.

Having now considered the nature of torts, the distinctions between mere torts and acts actually amounting to crimes, and the differences between acts which are purely and simply torts in the more limited sense of the word, and breaches of contract, it remains but to notice in this chapter that there are certain acts, which, though they are torts, yet the law allows no redress for, principally upon public grounds.

(s) Page 660.

(t) From the above the student will perceive that there are various matters before treated of under Part I., "Contracts," which might perhaps with equal propriety be considered in this part, "Torts," particularly such subjects as Carriers, Innkeepers, and Bailments generally.

(u) *Gerhard v. Bates*, 2 E. & B. 476; *Langridge v. Levy*, 2 M. & W. 519.

Maxim that
the king can
do no wrong.

There is no remedy for a tort committed by the sovereign, because of the maxim, "The king can do no wrong" (x).

Acts done by
a judge of
a court of
record.

For any act done by a judge of a court of record, no action lies, provided such act is done in the proper and appropriate discharge of his legal duties, for it is considered for the benefit of the community at large that the judges should have full scope and not be fettered and impeded by any restraint and apprehensions, and this is so even although a judge's acts may be shewn to have proceeded from malice. But if an act is done by a judge not acting judicially, or if an act is done by him in respect of some matter not at all within his jurisdiction, he is not protected then, but is liable in the same way as any other person (y).

Acts done by
a superior
officer.

Again, a superior officer is justified in arresting and imprisoning an officer under him for the purpose of bringing him to a court-martial in accordance with the rules of the service, and this is so even although the person so arrested is not ultimately brought to a court-martial, if the arrest was in respect of some matter fairly cognisable by a military tribunal, and

(x) Broom's Legal Maxims, p. 52. The meaning of this maxim is stated in Broom's Legal Maxims, as follows: "Its meaning is, first, that the sovereign individually and fully in his natural capacity is independent of, and is not amenable to, any other earthly power or jurisdiction, and that whatever may be amiss in the condition of public affairs is not to be imputed to the king, so as to render him answerable for it personally to his people; secondly, the above maxim means that the prerogative of the Crown extends not to do any injury, because being created for the benefit of the people it cannot be exerted to their prejudice, and it is, therefore, a fundamental general rule that the king cannot sanction any act forbidden by law, so that in this point of view he is under and not above the laws, and is bound by them equally as his subjects. If, then, the sovereign personally command an unlawful act to be done, the offence of the instrument is not thereby indemnified, for though the king is not himself under the coercive power of the law, yet in many cases his commands are under the directive power of the law, which makes the act itself invalid if unlawful, and so renders the instrument of execution thereof obnoxious to punishment."

(y) See Broom's Coms. 108-112, and cases there cited and referred to.

no action will lie against the superior officer (z). And this rule has been carried so far that it has been decided that it will apply even although the tortious act complained of is done maliciously, and without reasonable and probable cause (a).

It has been already pointed out that, when a person has committed a tortious act of such a grave kind as to amount to a felony, the law refuses redress for the civil injury until public justice has been obtained by the prosecution of the offender (b).

If two or more persons commit a tort, and the plaintiff recovers against them, but levies the whole damages on one, that one has no right to recover contribution from the other or others, for *Ex turpi causâ non oritur actio* (c). And although, if a person is instructed to do some palpably tortious act, and the person so instructing him undertakes to indemnify him from the consequences of such act, no action will lie, yet if the act he is so instructed to do does not appear of itself manifestly unlawful, and he does not know it to be so, he can recover thereon (d). Thus, if A. instructs B. to drive certain cattle from a field, which B. does, thereby unwittingly committing a trespass, A. is bound to indemnify him; but if A. instructs B. to assault a person, which he does, this is an act manifestly illegal in its nature, and B. cannot call upon A. to indemnify him.

(z) *Hannafoad v. Hunn*, 2 C. & P. 148; *Dawkins v. Lord Rokeby*, 4 F. & F. 806.

(a) *Dawkins v. Lord Paulet*, L. R. 5 Q. B. 94. Lord Chief Justice Cockburn, however, dissented from this.

(b) *Ante*, p. 250.

(c) *Merryweather v. Nixan*, 2 S. L. C. 546; 8 T. R. 186. It is otherwise in contract. For a further illustration of the maxim *Ex turpi causâ non oritur actio*, see *Hegarty v. Shine*, Irish Reps. 2 Q. B. D. 273. See also *post*, p. 338.

(d) *Per* Lord Kenyon in *Merryweather v. Nixan*, *supra*; *Betts v. Gibbon*, 2 A. & E. 57.

CHAPTER II.

OF TORTS AFFECTING LAND.

Different torts affecting land. EVERY person possessed of land has necessarily a right to the peaceful possession and enjoyment of such lands, and the infringement of this right is a tort in respect of which an action will lie. The infringement of this right may happen in various ways, but the most important infringements are by trespass, by commission of nuisances, and by waste.

I. Trespass.
Meaning of
the term
"trespass."

A trespass, in its widest sense, signifies any transgression or offence against the laws of nature, of society, or of the country in which we live, whether relating to a man's person or to his property (*e*); but we have here only to consider trespass to lands, which has been defined as a wrongful and unwarrantable entry upon the soil or land of another person (*f*), and is styled trespass *quare clausum fregit*.

Trespass to
lands :

In considering the subject of trespass to lands, two main points present themselves, viz. :—

1. The position of the party claiming that a trespass has been committed.

2. What will amount to a trespass.

1. The position
of a person
claiming that
a trespass
has been com-
mitted.

Firstly, then, as to the position of the party claiming that a trespass has been committed. It is necessary

(*e*) Brown's Law Dict. 365.
(*f*) Broom's Coms. 755.

that he should have a valid title to the lands, and that he should be actually in the exclusive possession of the lands by himself, his servant, or agent (*g*). It is not, however, actually essential that the plaintiff should in every action for trespass to his lands prove his strict title to the lands, for possession is the great requirement, and if the plaintiff proves that he is in possession, as above, that makes out a sufficient *primâ facie* case on which he can recover (*h*); but if the defendant in any such action sets up in his statement of defence that the title to the lands in respect of which the trespass is alleged to have been committed is not in the plaintiff but in him the defendant, or in some third person by whose authority he has entered, then the actual title to the lands is in question (*i*). An action of trespass, therefore, is frequently resorted to as a method of trying the title to lands: thus if there is a dispute between two proprietors, A. and B., as to which of them is entitled to a certain field in possession of B., A. can enter thereon, and B. subsequently bringing an action for that trespass, the point of which of them is entitled will be determined.

An action for trespass is frequently resorted to, to try the title to lands.

By the Real Property Limitation Act, 1874 (*k*), it is provided that no person shall make any entry or distress, or bring any action, to recover any land or rent but within twelve years after the time of the accrual of the right to such person or some one through whom he claims (*l*); but in cases of infancy, coverture, or lunacy existing at the time of the accrual of the right of action, then six years is to be allowed from the termination of the disability or previous death (*m*), but thirty years is to be the utmost allowance for all dis-

Real Property Limitation Act.

(*g*) *Hodson v. Walker*, L. R. 7 Ex. 55.

(*h*) See Broom's Coms. 757.

(*i*) Addison on Torts, 372-374.

(*k*) 37 & 38 Vict. c. 57.

(*l*) Sect. 1.

(*m*) Sect. 3.

abilities (n); and the Act specially provides that "the time within which any such entry may be made, or any such action or suit may be brought as aforesaid, shall not in any case after the commencement of the Act be extended or enlarged by reason of the absence beyond seas during all or any part of that time of the person having the right to make such entry, or bring such action or suit, or of any person through whom he claims" (o).

Very slight evidence of possession of land is sufficient to support an action for trespass.

When a reversioner may sue in respect of a trespass.

We have stated that the possession of the land in respect of which the trespass is committed is an essential to the position of the plaintiff, but "very slight evidence of possession is sufficient to establish a *prima facie* title to sue for an injury . . . such as the occupation of the soil with stones and rubbish which have been placed thereon by order of the plaintiff, and kept there for some short time without molestation, or the building of a wall, or a dam, mound, or fence, which goes on for some weeks without interruption and is then knocked down; or the inclosure or cultivation of a piece of waste ground, the mowing of the grass thereof or the pasturing of a cow thereon; for mere occupancy of land, however recent, gives a good title to the occupier whereon he may recover against all who cannot prove an older and better title in themselves" (p). There is, however, one case in which a person may maintain an action for trespass committed to lands although not in possession, and that is in the case of a reversioner, who, if some injury of a permanent kind is done to his reversion, may sue for the same (q), although in respect of the immediate injury to the land he would have no right of action, that being in the possessor, the actual tenant. Thus, if a person trespasses and cuts

(n) 37 & 38 Vict. c. 57, s. 5.

(o) Sect. 4. See also as to Limitation, *ante*, p. 210.

(p) Addison on Torts, 372, 373.

(q) *Cox v. Glue*, 5 C. B. 533.

down trees, the tenant of the lands in possession may sue for the injury done to the residential value of the property, and the landlord for the diminished saleable value (r).

A mortgagor, by mortgaging, parts with the legal estate in the lands, and therefore could not formerly have maintained an action in respect of any trespass committed on the property; but it is now provided by the Judicature Act, 1873 (s), that "a mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession or enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person." The effect of this provision is, for these purposes, to treat the mortgagor as the substantial owner, and the meaning of the last few words of the section is, that if he is not the sole owner, but entitled only jointly, the provision shall not in such a case authorize him to sue alone.

When a mortgagor may maintain an action for trespass.

It is not at all necessary in an action of trespass for the plaintiff to shew that he has sustained any special damage, the mere fact of the trespass entitling him at any rate to a nominal verdict (t); the fact of a person trespassing after notice or warning not to do so, will operate to aggravate the offence, and justify the jury in giving damages of a penal nature (u).

In an action for trespass to land it is not essential to prove any special damage.

(r) Addison on Torts, 375. See also *post*, p. 372.

(s) 36 & 37 Vict. c. 66, s. 25 (5). See also *ante*, p. 54.

(t) Broom's Coms. 756.

(u) *Merest v. Harvey*, 5 Taunt. 441.

Exception to the maxim, *Actio personalis moritur cum personâ*.

In the case of trespass to land, and the owner of such land dying, the right of action survives to the executors or administrators, provided the injury was committed within six months of the owner's death, and that the action is brought within one year after his death; and this forms an exception to the maxim, *Actio personalis moritur cum personâ* (x).

2. What will amount to a trespass to land.

Entry may be constructive.

Secondly. What will amount to a trespass to land? We have defined trespass to land as a wrongful and unwarrantable entry upon the soil or land of another person (y), and it therefore follows that entry is the essential to constitute a trespass. But this entry need not be actual, it may be constructive, as by a person throwing stones or rubbish on to his neighbour's land, or by letting a chimney or any other part of his house fall thereon, or by erecting a spout on his own lands which discharges water on to his neighbour's (z). So also if a man's cattle stray from his own lands on to his neighbour's, the latter not being under any legal obligation to fence them out, this amounts to trespass; but this rule as to cattle does not apply to dogs, for the owner of a dog is not liable for its straying and doing injury, unless it is of some peculiarly mischievous disposition (a). And if cattle are lawfully passing along a highway and stray on to adjoining land through its not being properly fenced off, this does not amount to a trespass, though otherwise if they are not passing along, but staying there (b). A person is not generally under any obligation to fence out his neighbour's cattle for his neighbour's protection, though the contrary may be the law either from express contract to that effect or by prescription, Railway companies are, however, under the provision of

Obligation as to fencing out catt.e.

(x) 3 & 4 Wm. 4, c. 42, s. 2. See other exceptions to the maxim, *post*, pp. 290, 338-341.

(y) *Ante*, p. 256.

(z) Addison on Torts, 330, 331.

(a) *Ibid.*, 110-112.

(b) See *Dovaston v. Payne*, 2 S. L. C. 142; 2 Hen. Blackstone, 527.

the Railway Clauses Act, 1845 (c), bound to fence to keep out the cattle of adjoining proprietors (d).

The fact of a lawful owner of lands out of possession peaceably entering thereon is justifiable, and does not constitute a trespass; thus if a tenant wrongfully holds over after the expiration of his tenancy, there is no doubt that the landlord may peaceably enter, and thus by his own act regain possession; and it has even been held that in such a case a landlord is justified in forcibly entering and turning the tenant out, even though in so doing he may commit a breach of the peace. He may possibly be liable for an assault, but he cannot be liable for a trespass on his own land (e).

A lawful owner out of possession may peaceably enter.

And it seems a landlord may forcibly eject a tenant whose term has expired.

The fact that the owner of lands gave to a person licence or permission to come on his lands will, of course, justify and excuse what would otherwise be a trespass, but will not justify the remaining after rescission of such permission. A person is justified in removing a trespasser from his lands, provided he first require him to leave, and in removing him he does not use a greater amount of force than is necessary under the circumstances.

A person is justified in removing a trespasser from his lands;

A person is justified in forcibly defending the possession of his land against any one who attempts to take it (f).

Or in forcibly defending possession.

Persons sometimes have rights over the lands of others, entitling them to do acts which, if they had not such rights, would amount to trespasses; and of such

Some special rights over the lands of others.

(c) 8 & 9 Vict. c. 20, s. 68.

(d) And it has recently been decided that this duty of railway companies extends to keeping out swine, although swine require a stronger kind of hedge than cattle: see *Child v. Hearn*, L. R. 9 Ex. 176; 43 L. J. Ex. 100.

(e) *Newton v. Harland*, 1 Mr. & Gr. 644; per Parke, B., *Harvey v. Bridges*, 14 M. & W. 442.

(f) *Tully v. Reed*, 1 C. & P. 6.

Easements.

rights the chief are Easements and Rights of Common. An easement has been well defined as "The right which the owner of one tenement, which is called the dominant tenement, has over another, which is called the servient, to compel the owner thereof to permit something to be done, or to refrain from doing something, on such tenement for the advantage of the former" (*g*). Rights of water-course and rights of way may be mentioned as easements (*h*).

Rights of common.

A right of common has been defined as "The right which one person has of taking some part of the produce of land, while the whole property of the land itself is vested in another" (*i*). Instances of rights of common are the right of pasturing cattle on another's lands, called common of pasture; the right of cutting turf on another's lands, called common of turbary; and the right of fishing in water on another's lands, called common of piscary (*k*).

Riparian proprietors.

Where persons own land adjoining a river (*l*), the soil is vested in each up to the centre of the stream, and if either deals with it beyond that point he is a trespasser. Each of such persons has a right to use the water for all proper purposes, provided he does not thereby interfere with his neighbour's enjoyment thereof, and to do so—*e.g.*, by preventing the water from flowing to some proprietor below—is a tort for which an action will lie (*m*). But this does not apply where water flows under the surface in no defined channel, for in such a case a landowner is justified in sinking a well and preventing the water from percola-

(*g*) See notes to *Sury v. Pigot*, in Tudor's Conveyancing Cases, p. 154.

(*h*) This is a subject belonging to Conveyancing. As to it, see *Sury v. Pigot*, (*supra*), and notes thereon.

(*i*) See notes to *Tyrringham's Case*, in Tudor's Conveyancing Cases, p. 120.

(*k*) This subject also pertains to Conveyancing, and reference may be made to the notes in *Tyrringham's Case* (*supra*).

(*l*) Such persons are called riparian proprietors.

(*m*) See notes to *Sury v. Pigot*, Tudor's Conveyancing Cases, p. 154.

ting through to, or draining it from, his neighbour's lands (*n*).

Where one person is possessed of the surface of land and another of the subsoil, each has an independent property in respect of which trespass may be committed. It is the duty of the owner of the subsoil to leave sufficient support to maintain the ground above, and the owner of the ground above must not interfere with the soil beneath. Every owner of land has a right to the lateral support of his neighbour's land to sustain his own unweighted by buildings, but nothing more, unless, indeed, a title is gained by prescription (*o*).

Position when one party is possessed of the surface and the other of the subsoil of land.

A nuisance (*p*) may be defined as some act which unlawfully and unwarrantably injures or prejudices the rights of another person; thus, the carrying on an offensive or noisy trade (*q*), the excessive ringing of a peal of bells (*r*), the improper emission of smoke from a chimney (*s*), the suffering drains to get into an offensive state (*t*), and many other acts, have been held to be nuisances (*u*). But it must not be understood from the foregoing that because a person simply carries on a trade which is somewhat objectionable to his neighbour, that the carrying on of that trade must necessarily constitute a nuisance; to amount to a nuisance, the matter must go farther than that, and

II. Nuisances.
Definition.

What acts are sufficient to constitute a nuisance.

(*n*) *Chasemore v. Richards*, 7 H. of L. Cas. 349; *Grand Junction Canal Co. v. Shugar*, L. R. 6 Ch. 483. This, it will be remembered, is an instance of a damage without what is considered an injury in the eyes of the law—that is, *damnum sine injuria*. See *ante*, p. 4.

(*o*) Addison on Torts, 395.

(*p*) From *nuire*, to annoy. The author has considered the subject of nuisances generally in this chapter, though many nuisances affect only the person, and do not therefore come under the heading of this chapter, "Of torts affecting land."

(*q*) *St. Helen's Smelting Co. v. Tipping*, 11 H. of L. Cas. 642.

(*r*) *Soltau v. De Held*, 2 Sim. (N.S.) 133.

(*s*) *Rich v. Basterfield*, 4 C. B. 78.

(*t*) *Russell v. Shenton*, 3 Q. B. 449.

(*u*) For numerous instances of acts that will amount to nuisances, the student is referred to Addison on Torts, pp. 334–343.

it must be shewn that there is some special injury resulting therefrom. Thus, a person may possibly have a material objection to a butcher's shop being set up next door to him, and it may deteriorate from the value of his house, but this act will not of itself be a nuisance, though if by reason of the way in which the person conducts his business offensive smells penetrate to the next house, then undoubtedly it might be. It is not every mere discomfort a person may experience that will constitute a nuisance, but an injury to a person's property will (x). Were it otherwise, the question of nuisance or no nuisance, would frequently involve questions of fancy, of whether this person's delicacy made an act a nuisance which to another person in the same position would be no nuisance at all (y).

It is no defence to an action for a nuisance that the act is a benefit to other persons or to the community at large.

Although a person comes to a nuisance he still has a right to have it abated.

But, on the other hand, where there is some act done which really does amount to a nuisance to some person or persons, it is no defence to say that the act is a benefit to other persons or to the community at large, or that the place where it is carried on is very convenient for the public. Thus, there are many trades of an offensive character that necessarily must be carried on, and as to which it would be a detriment to the public were they not followed; but that fact does not justify a person in establishing such a trade where it prejudices another (z), he must seek out another place where he can carry it on without doing injury to any one. And if a person comes to a place where a nuisance is existing, he has an equal right to his legal remedies in respect of that nuisance as if he had been there first, and the nuisance had been afterwards established (a).

(x) *St. Helen's Smelting Co. v. Tipping*, 11 H. L. C. 650.

(y) See also hereon, Broom's Coms. 708.

(z) *Ramford v. Turnley*, 31 L. J. (Q.B.) 266; *Stockport Waterworks Co. v. Potter*, 31 L. J. (Ex.) 9.

(a) Per Byles, J., *Hole v. Barrow*, 27 L. J. (C.P.) 208.

Nuisances are divided into two classes, viz. :

Nuisances may
be either
public or
private.

1. Public nuisances, which are acts that affect the public at large, *e.g.*, the digging of a ditch in a public road, or the causing of a great smoke ; and

2. Private nuisances, which are acts that affect only some particular individual or individuals, and not the public at large, *e.g.*, an offensive smell which only penetrates to the next house, or a noise only affecting a neighbour.

There are very material differences in the remedies in the case of a public and a private nuisance. A public nuisance being a public wrong, affecting the community at large, a public remedy is applied to it, and (except in the case presently mentioned) a private remedy does not exist. The remedies for a public nuisance are two, viz., Indictment and Information. An indictment is a written accusation laid against one or more persons of a crime or misdemeanor preferred to and presented upon oath by the grand jury (b), and there are many cases of public nuisances in which an indictment is the strictly proper course, *e.g.*, the keeping of gunpowder in large quantities in close proximity to populous neighbourhoods, the blocking up of or other injury to a public road, the keeping of a disorderly house, indecent bathing, or the carrying of persons infected with contagious disorders through the public streets in such a way as to endanger the health of the public (c). An information is a process preferred in the name of the Attorney-General or Solicitor-General for the purpose of restraining on behalf of the public the commission or continuance of some public injury, and is a remedy frequently resorted to in cases of ordinary public nuisances.

Differences
between them
in the remedy
in respect of
them.

The remedies
in respect of
a public
nuisance are
Indictment and
Information.

(b) Brown's Law Dict. 186.

(c) See Broom's Coms. 893-895.

The remedy
in respect of
a private
nuisance is
an action.

But a person
may be barred
by his laches.

Where a
private person
may maintain
an action in
respect of
a public
nuisance.

*Sollau v.
De Held.*

As to a private nuisance, however, it is no offence against the public but only against a private individual, and, therefore, there is no public remedy, but a private one, in respect of it. This private remedy is exercised by bringing an action in which the plaintiff may simply seek damages for the injury that has been done to him by the commission of the nuisance, or he may seek an injunction to restrain the commission or continuance of the nuisance, or he may seek both, that is to say, damages for the injury already done him, and an injunction to prevent the continuance of such injury. If, however, there has been leave and licence expressly given, or impliedly given by a person standing by for some time and acquiescing tacitly in the doing of some act which constitutes a nuisance—*e.g.*, if he stand by and sees a building completed which he knows is being erected for the purpose of carrying on an obnoxious trade amounting to a nuisance—he will lose his right to an injunction, though it would be otherwise were he not aware that the act would constitute a nuisance, or if the nuisance exceeded what he had reasonable grounds for believing it would amount to (*d*).

It has been mentioned (*e*) that there is one case in which a private remedy will lie in respect of the commission of a public nuisance, and that case is where although it is a public nuisance, yet it more prejudicially and injuriously affects some individual or individuals than the public at large; for in this case, as the public remedy only lies for the public at large, the individual or individuals so particularly affected may bring an action or actions in respect of the special injury done to him or them. This is well shewn by a case commonly known as the Clapham bell-ringing case (*f*). There the plaintiff resided in a house adjoining a Roman Catholic chapel of which the defen-

(*d*) Addison on Torts, 352–354.

(*e*) *Ante*, p. 265.

(*f*) *Sollau v. De Held*, 2 Sim. (N.S.) 133.

dant was the priest. The defendant had caused to be rung at various times during the day peals of bells for devotional and other purposes connected with such chapel, and the noise was so great as to materially inconvenience not only the plaintiff but the public at large in the parish; the ringing was in fact a public nuisance. The plaintiff sought an injunction against the ringing, and it was objected that it being a public nuisance he could not come as an individual and restrain it; but it was held that although that was certainly the rule as regarded public nuisances generally, yet here the plaintiff, as a person residing close to the nuisance and therefore more prejudicially affected than the public at large, was entitled to an injunction.

Besides the before-mentioned remedies by legal process there is yet another course that can sometimes be taken by a person affected by a nuisance, and that is the abatement of it, which may be defined or described as a remedy by the act of the party, consisting in the removal and doing away of the nuisance. Here again is another difference between a public and a private nuisance, for in one of the former kind it can only be abated where it does the person abating it some special and peculiar harm, but in one of the latter kind the person prejudiced has always the right of abating it (g). Thus, in the case of an obstruction placed on a public road, strictly speaking a private person has no right to remove it unless he requires to pass that way, and then as it does him a special and peculiar injury he may; but in the case of, say, the erection of a spout discharging water on to a person's land, here, as this is a private nuisance only affecting that person, he has a right to remove it.

Abatement
of nuisances.

A public
nuisance
can only be
abated where
it particularly
affects the
abator.

(g) Broom's Coms. 220-222; *Mayor of Colchester v. Brook*, 7 Q. B. 339; *Earl of Lonsdale v. Nelson*, 2 B. & C. 302.

The abatement of a nuisance must be done peaceably.

Notice usually necessary before entering on another's lands to abate a nuisance.

A person may not go on another's lands to prevent a nuisance.

III. Waste.
Definition.

Persons liable for waste.

The abatement of a nuisance must, however, be done peaceably and without danger to life or limb; so that although if a house is wrongfully built on another's land (which will constitute both a trespass and a nuisance), the person affected is justified in pulling it down, yet he cannot do so if individuals are actually in the house at the time (*h*). And if to abate a nuisance it is necessary to enter on another's land, notice must be given to the occupier of such land requiring him first to remove it (*i*), unless it is of such a kind as to render it positively unsafe to wait, when an immediate entry will be perfectly justifiable (*j*), provided it is made peaceably, or at the most with as little violence as is necessary under the circumstances. And although a person may be justified in entering on another's lands to abate, he is not justified in so entering to prevent the commission of a nuisance (*k*).

Waste may be defined as some act committed by a limited owner of an estate exceeding the right which he has therein; it does not appear to be strictly correct to say that it is some act which tends to the depreciation of the inheritance, nor to say that it is some havoc or devastation, for (as will be presently noticed (*l*)) an act which does not really injure the property, but on the contrary improves it, may yet amount to waste. As to who are liable for waste, tenants for life, for years, at will, or at sufferance are; but a tenant in tail is not, because he can at any time bar the entail and make himself absolute owner of the property, unless he be a tenant in tail after possibility of issue extinct, and then, as he cannot bar the entail, he is liable for that kind of waste called equitable waste. A tenant in fee simple is of course not at all liable for waste, unless,

(*h*) *Perry v. Fitzhove*, 8 Q. B. 757.

(*i*) *Ibid.*

(*j*) Per Best, J., *Lonsdale v. Nelson*, 2 B. & C. 311.

(*k*) Addison on Torts, 364. See further as to Abatement of Nuisances, Addison on Torts, 332-366, Broom's Coms. 220-222.

(*l*) *Post*, pp. 269, 270.

indeed, he be a tenant in fee with an executory devise over (*m*).

Waste is divided, with reference to the nature of the acts done, into two classes, viz. : Different kinds of waste.

1. Voluntary waste ;
2. Permissive waste.

And it has also been commonly divided, with reference to the remedy in respect of it, into two other classes, viz. :

1. Legal waste ;
2. Equitable waste.

And though now, in consequence of the Judicature Act, 1873, as will be presently noticed (*n*), there is no further distinction in the remedy, yet the names of legal and equitable waste will undoubtedly continue to be used, at any rate for a very long time.

Voluntary waste is where the waste consists in the active doing of something, whilst permissive waste is a mere passive act. Thus, instances of the former would be the pulling down of a house or premises, the cutting down of a tree, the opening of new mines or gravel-pits, or the turning of ancient meadow land into arable land ; the latter would be the suffering a house or premises to go to ruin through lack of due repairs. All the instances above given of voluntary waste necessarily tend to the depreciation of the inheritance, and amount to havoc or devastation, but voluntary waste may be committed though it does no real injury to the inheritance or even improves the estate (*o*) ; thus, for instance, the limited owner of a house, as for life or for

Distinction between voluntary and permissive waste.

To constitute voluntary waste the act need not depreciate the property.

(*m*) As to the different kinds of tenancies above mentioned, and the powers of such tenants in respect of waste and otherwise, see Williams on Real Property. On the subject of waste generally, see also *Lewis Bowles' Case*, Tudor's Conveyancing Cases, 37, and the notes thereon.

(*n*) *Post*, p. 271.

(*o*) Addison on Torts, 257, and see notes to *Lewis Bowles' Case*, Tudor's Conveyancing Cases, 37.

years, has no right to pull it down and rebuild it, or to materially alter it, even though such rebuilding or alteration may really be an actual benefit by increasing the value of the property.

Waste by fire. If a fire takes place and the premises are thereby burnt down or injured, this will be waste if either done wilfully by the limited owner or his servants or agents, or through his or their negligence (*p*).

The remedy for waste.

For all ordinary acts of waste, the person injured thereby had his remedy at law for damages, and in equity for an injunction either to restrain threatened waste or the continuance of waste already commenced; and by the Common Law Procedure Act, 1854 (*q*), power was also given to the courts of common law to grant an injunction, and by a still later Act (*r*) power was given to the courts of equity to award damages. Now under the provisions of the Judicature Act, 1873 (*s*), the remedy, for either an injunction or damages, or for both, is by action in any division of the High Court of Justice.

Distinction between legal and equitable waste.

Now as to the other division of waste, viz., legal and equitable. Waste was said to be legal when there was a remedy at law for it, and therefore all ordinary cases of waste are, whether voluntary or permissive, equally legal waste. But waste was said to be equitable when it was only recognised as waste and relieved against in equity. It occurred in this way: If an estate was given to a limited owner expressly without impeachment for waste, at law he was allowed to commit without restriction any act of waste he chose, this being indeed strictly according to the manner in which it was given to him, but in equity, notwithstanding it was so given, the Court would interfere to prevent the

(*p*) Addison on Torts, 339; see further *post*, p. 346.

(*q*) 17 & 18 Vict. c. 125, s. 79.

(*r*) 21 & 22 Vict. c. 27.

(*s*) 36 & 37 Vict. c. 66.

pulling down of the family mansion-house or the cutting down of ornamental timber, such acts being considered by the Court to be either malicious, extravagant, or humorsome, and this was called equitable waste. As to the remedy in this case, the distinction is certainly now done away with by the Judicature Act, 1873 (*t*), that statute providing (*u*) that “an estate for life without impeachment for waste shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating the estate.” This provision arises naturally from the union effected by the Act of the different courts, for it would have been an anomaly to have allowed a remedy for this kind of waste to have existed in the Chancery Division of the present High Court of Justice and not in the other divisions, and therefore now, whatever is the nature of the waste committed, the action in respect of it can be commenced indiscriminately in any division of the High Court, but, notwithstanding this, wrongful acts committed by limited owners holding without impeachment for waste would yet appear to be properly described as equitable waste (*x*).

Provision of
Judicature
Act, 1873, as
to equitable
waste.

It was stated at the commencement of the present chapter that trespass, nuisances, and waste were the most ordinary and important kinds of torts affecting land, and of these instances might be enumerated and dwelt upon at great length, but to do this is not the object of the present work, neither does space permit. The student will also have noticed that various points touched upon pertain more especially to conveyancing and the law of real property, and such matters have therefore been considered as cursorily as possible.

(*t*) 36 & 37 Vict. c. 66.

(*u*) Sect. 25 (2).

(*x*) As to equitable waste, see *Garth v. Cotton*, 1 White and Tudor's Equity Cases, 697, and the notes thereon. Snell's Principles of Equity, 567.

CHAPTER III.

OF TORTS AFFECTING GOODS AND OTHER PERSONAL PROPERTY,
AND HEREIN OF THE TITLE TO THE SAME.

Torts to goods, &c., come under the heads of trespass *de bonis asportatis* or conversion.

TORTS to goods and other personal property mainly come under one of two divisions, viz.: (1) Trespass, which is called trespass *de bonis asportatis*; and (2) Conversion. The former may be defined as the wrongful meddling by a person with the goods of another, either by removing them or otherwise dealing with them (y); and the latter as the removal by a person of goods from the possession of another with the design either of depriving that other of them, or of exercising some dominion or control over them for his own benefit or the benefit of some third person (z).

Mode of considering torts to goods, &c., adopted in this chapter.

We will consider the subject in the following manner:—

1. The title necessary to enable a person to sue in respect of a tort.
2. The distinction between trespass and conversion, and particular cases of each.
3. Justification of the tortious act.
4. Some miscellaneous points connected with the subject.

(y) See Addison on Torts, 457.

(z) Ibid. 458.

The mere fact of a person having goods in his possession generally raises a presumption that they are his property, and that he has a perfect title to them, so that he can dispose of and deal with them to the fullest extent; and generally speaking the mere fact of bare possession constitutes a sufficient title to enable the party enjoying it to maintain an action against a mere wrongdoer (a); but this is not always so, for a person may have possession of goods, and yet have no real title to them, or an imperfect one.

I. Title.

Possession raises a presumption of title.

As to stolen goods, the thief naturally has no good title to them, and the law is (except in the case of bills of exchange, promissory notes, and other negotiable instruments (b)) that he can give no title to them except by a sale in market overt (i.e., open market), and not even then if the thief is prosecuted to conviction. By a sale in market overt is meant selling goods in open market as opposed to selling them privately. In the country, the market-place or piece of ground set apart by custom for the sale of goods, is in general the only market overt there; but in London and in other towns, when so warranted by custom, a sale in an open shop of proper goods is equivalent to, and in fact amounts to, a sale in market overt (c). This advantage of a sale in market overt existed at common law (d), and is of material importance, enabling as it does a person to give a good title to goods where he could not have done so by a private sale of them; but it must also be carefully borne in mind, as stated above, that there is one case in which even this kind of sale by a wrongful owner will not have this effect, it being

As to stolen goods.

What is meant by market overt.

The advantage of a sale in market overt existed at common law.

(a) *Armory v. Delumirie*, 1 S. L. C. 374, 1 Strange, 504; per Lord Campbell, C.J., in *Jeffries v. Great Western Ry. Co.*, 5 E. & B. 805.

(b) As to which, see *ante*, pp. 138, 139, and the case of *Miller v. Race* there referred to.

(c) Brown's Law Dict. 226, 227.

(d) See the case of *Market Overt*, Tudor's L. C. Mer. Law, 713, and also see *Crane v. London Dock Co.*, 33 L. J. (Q.B.) 224.

24 & 25 Vict.
c. 96, s. 100.

Effect of this
Act.

provided by statute (e) that where a person shall be prosecuted for a felony or misdemeanor in respect of goods or other personal property on behalf of the owner or his representatives, and shall be convicted thereof, the property in respect of which the offence is committed shall be restored to the owner or his representative, and the Court before whom the criminal offence is tried may order their restoration. It has, however, been decided that this power given to such Court is not exclusive, but only cumulative, and that the effect of the Act is to re-vest the right of property and of possession in the owner or his representative without any such order, so that he has a right to require the person having possession of the stolen property to deliver it up, and if he does not do so, to sue him for it (f). And it has been decided that where goods have been obtained by fraud, and the person who has so obtained them disposes of them to another who takes *bonâ fide* before the fraud is discovered, yet he is liable to be sued by the original owner in respect of them (g).

Special provisions as to
sale of a horse.

And as to one particular kind of property, viz., a horse, it is expressly provided that even although bought in market overt, a sale of it will confer no better title than the vendor had, unless it has been exposed there for sale for an hour between ten in the morning and sunset, and also the price, colour, and marks of it, together with the names, descriptions, and abodes of the buyer and seller, have been taken down by the book-keeper; and even if these formalities are complied with, if the horse has been stolen, the rightful owner may at any time within six months after the sale recover it, on tendering to the person possessed of it the price he has *bonâ fide* paid for it (h).

(e) 24 & 25 Vict. c. 96, s. 100, re-enacting 7 & 8 Geo. 4, c. 29, s. 57.

(f) *Scattergood v. Sylvester*, 19 L. J. (Q.B.) 447.

(g) *Cundy v. Lindsay*, 3 App. Cas. 459, affirming the decision of the Court of Appeal in *Lindsay v. Cundy*, L. R. 2 Q. B. Div. 96, which reversed the decision of the court below, L. R. 1 Q. B. Div. 348.

(h) 2 & 3 P. & M. c. 7; 31 Eliz. c. 12.

A person who has found goods does not acquire any absolute title by such finding, but he does acquire a qualified title that will be good against all the world except the rightful owner or his representatives. This was decided in the important case of *Armory v. Delamirie* (i). There the plaintiff, a chimney-sweeper's boy, had found a jewel, and taken it to the shop of the defendant, a goldsmith, to know what it was; he there delivered it to the defendant's apprentice, who, under a pretence of weighing it, took out the stone, and the master, the defendant, offered him, the plaintiff, three-halfpence for it. On his refusing to accept this, and requiring to have the jewel back, the socket was returned to him without the stone, and this action was brought in respect of the wrongful conversion, for the recovery of the jewel, or for damages. It was objected that the plaintiff had no title to enable him to sue in respect of the wrongful conversion, but the Court decided that he might do so, as though he had no absolute title to it, yet he had a title against everyone but the rightful owner. So also where a person picked up a parcel of bank notes in the defendant's shop, and temporarily deposited it with the defendant to restore to the true owner when he was ascertained, and no owner appeared to claim them, it was held that the original finder might recover them from the defendant (k). These cases illustrate the rule already stated, that bare possession is generally sufficient title as against wrongdoers. If an honest finder sells to a person *bonâ fide* in market overt, he will give a perfect title, as there is here no one liable to be prosecuted and convicted.

Any money, coin, gold, silver, plate or bullion found (*trouvée*) in the earth or sea, the owner whereof is unknown, is called treasure trove. The property therein, and the title thereto, under different circumstances,

(i) 1 S. L. C. 374; 1 Strange, 504.

(k) *Bridges v. Hawkesworth*, 21 L. J. (Q.B.) 75.

vests either in the Crown, the lord of the manor within whose limits it is found, or the finder (*l*).

A judgment does not affect the title to goods.

A person purchasing goods from one against whom a judgment has been signed gains a perfect title to such goods unless they are actually taken in execution, or he has, at the time of acquiring his title, notice that a writ of execution is lying unexecuted in the hands of the sheriff, under which the goods might be seized (*m*). A person purchasing goods from one who has been actually adjudicated a bankrupt can gain no title to them, nor can he after an act of bankruptcy and before adjudication, unless he has bought them *bonâ fide* without notice of the act of bankruptcy (*n*).

Property in animals and fish.

In animals of such a nature as horses, cows, sheep, &c., a person may of course have an absolute property, but in animals of a wild nature and not ordinarily in man's dominion, called animals *feræ naturæ*, he can only gain a qualified property, as by taming them, or their being on his land, or their being so young as not to be able to get away, or by reason of his being possessed of a forest, chase, or rabbit-warren. Also in fish a person may gain a title by harpooning or hooking them (*o*).

Property in game passes to a lessee at common law, but not now.

Where a person leases his lands to another without reserving the game, it belongs by the common law to the tenant; but by the principal Game Act (*p*), it is provided that in all cases of tenancies existing before the passing of that Act (*q*), the landlord shall have the right to the game except such right has been expressly granted or allowed to the tenant, or a fine shall upon

(*l*) Brown's Law Dict. 364, 365.

(*m*) 19 & 20 Vict. c. 97, s. 1.

(*n*) 32 & 33 Vict. c. 71, ss. 94, 95.

(*o*) Addison on Torts, 495.

(*p*) 1 & 2 Wm. 4, c. 32.

(*q*) 5 Oct. 1831.

the granting or renewal of the lease have been taken (r). Under this Act the occupier for the time being of lands has the sole and exclusive right of killing and taking the game upon the land, unless such right be reserved to the landlord or any other person. Where any landlord has reserved to himself the right of killing game upon any land, it is lawful for him to authorize any other person or persons who shall have obtained an annual game certificate to enter upon such land for the purpose of pursuing and killing game thereon (s).

The distinction between the wrongful acts of trespass and conversion somewhat appears from the definitions already given of each of those acts (t), and it is well shewn in the following passage from Mr. Addison's work on Torts. It is there stated (u): "If a man who has no right to meddle with goods at all, takes them and removes them from one place to another, an action may be maintained against him for a trespass, but he is not guilty of a conversion of them unless he removed the goods for the purpose of taking them away from the plaintiff, or of exercising some dominion or control over them for the benefit of himself or of some other person. Thus, where the plaintiff and defendant, who were porters on the Custom House quay, had each small boxes in a hut on the quay for storing small parcels of goods until they could be put on board ship, and the plaintiff placed some goods in the hut in such a manner that the defendant could not get to his box without removing them, which he accordingly did, but forgot to put them back again, and the goods were lost, it was held that the defendant had a right to remove the goods, and so far in no fault; but as he had not returned them to the place where he found them, *there might be ground for an action for a trespass in meddling with*

II. Distinction
between
trespass to
goods and
conversion of
goods.

(r) 1 & 2 Wm. 4, c. 32, s. 7.

(s) Sect. 11.

(t) *Ante*, p. 272.

(u) Page 458.

them, but that there was no conversion of them, as the defendant had not in anywise disturbed the plaintiff's dominion or ownership over the property." From this the distinction between these two torts is very manifest, and it will be noticed that the conversion of goods is an act going beyond a mere trespass to them.

Instances of
trespass to
goods.

Numerous instances of trespass might be given; thus in the case of carriers of goods or innkeepers, dealing wrongfully with the goods they are conveying or holding, here are common instances in which an action will lie (x). So also if a wrongful distraint is made on goods, this is a trespass (y).

Duty of
person deliver-
ing dangerous
goods to be
carried, or
keeping
animals which
may escape
and do injury.

If one person lends out to another or gives to another to carry any article of a highly dangerous character, or which, though not naturally dangerous, has yet such defects as to make it dangerous, of which fact he is or ought to be aware, he is liable for any injury done to property thereby (z). And any person who keeps animals or other creatures which may escape and do injury to property, is liable for any injury occasioned by them (a), for it is the duty of the owners to keep such creatures with special care, so that they may do no injury. With regard, however, to animals *feræ naturæ*, such as rabbits, and with regard also to pigeons, it seems that though a person breeds them on his land, as he only has property in them whilst on his land, he is not liable if they escape for any injury they may do, the only remedy of the person injured being to capture or destroy them (b).

(x) See as to Carriers, *ante*, pp. 95-101, as to Innkeepers, *ante*, pp. 101-103.

(y) As to which, see *ante*, p. 64, and *Semayne's Case* there referred to; also as to when a person will be a trespasser *ab initio*, see *ante*, p. 65, and the *Six Carpenters' Case* there referred to.

(z) *Blakemor v. Bristol and Exeter Ry. Co.*, 27 L. J. (Q.B.) 167.

(a) *Rylands v. Fletcher*, L. R. 3 H. L. Cas. 330.

(b) Addison on Torts, 113.

In the case of creatures which are by their very nature likely to do injury, the owner is always liable for any damage done by them; but in the case of animals not of such a character, to make a person liable for injuries to property done by them, a previous *scienter* or knowledge of the creatures' mischievous propensities must be proved. This is shewn more particularly with regard to injuries to the person (c), but it has also application to injuries to personal property. On the above principle, therefore, that the *scienter* of the owner must be shewn, it was formerly held that if a man's dog strayed and trespassed on another's land, and by biting, worrying, or otherwise, injured that other's sheep or cattle, unless the owner could be proved to have known that his dog had previously so acted, he was not liable, because it was said the worrying and killing of sheep is not in accordance with the ordinary instinct and nature of the animal (d). The contrary is however now the law, it being enacted (e) that "the owner of every dog shall be liable in damages for injury done to any cattle or sheep by his dog; and it shall not be necessary for the party seeking such damages to shew a previous mischievous propensity in such dog, or the owner's knowledge of such mischievous propensity, or that the injury was attributable to neglect on the part of such owner" (f). Damages, where not exceeding £5, are under the provisions of this Act recoverable summarily before a justice or justices in petty sessions. It will be noticed that the words used in the Act are injuries to "cattle and sheep" only, so that as to injuries to animals not coming under those designations, or to other personal property, the rule as to the necessity of the *scienter* of the owner still remains law, *e.g.*, in

Injury by
ferocious
animals, and
animals not
naturally
ferocious.

(c) See this noticed in chapter vi. "Of Torts arising particularly from negligence," *post*, p. 336.

(d) Addison on Torts, 112, 113.

(e) 28 & 29 Vict. c. 60.

(f) Sect. 1.

the case of an injury done by one dog to another, this must be proved. It has, however, been decided (certainly as it would appear giving a somewhat extended meaning to the word), that the term "cattle" in the Act does include horses (*g*).

The doctrine of *scienter* does not apply when there is an obligation existing by contract.

The doctrine of *scienter* in relation to injuries to animals has been held not to be applicable to cases where there is an independent obligation by contract to take reasonable care; so that where the plaintiff entrusted the defendant with a colt to take care of, and the defendant put it in a field near to where he kept a bull, and the bull gored the colt, it was held that the defendant was liable although he had no *scienter* of the bull's viciousness, and in fact had always believed it be a perfectly gentle animal (*h*).

If a dog of a mischievous propensity strays and does injury, the owner is liable.

Although a person is not liable as a trespasser for his dog straying on to his neighbour's lands (*i*), yet if it be of a peculiarly mischievous propensity which is known to him, he is liable for any injury it may do to his neighbour's property (*k*); and if a dog whose nature it is to destroy game, or who has been trained for that purpose, strays on to another's land and does injury in that way, the owner is liable in respect of all such injury (*l*).

It is a tortious act to kill or injure another man's dog or cat,

To kill or injure any creature the property of another is a tortious act, for which the person so killing or injuring will be liable, even although the creature be only a dog or a cat. And it will also be a tortious act to kill the dog of another, although it is actually known to be of a ferocious disposition, and is found

(*g*) *Wright v. Pearson*, L. R. 4 Q. B. 582; 38 L. J. (Q.B.) 312.

(*h*) *Smith v. Cook*, 45 L. J. (Q.B.) 122.

(*i*) See *ante*, p. 260.

(*k*) Addison on Torts, 112.

(*l*) *Read v. Edwards*, 17 C. B. (N.S.) 245; 34 L. J. C. P. 32.

going at large ; unless, indeed, it is actually attacking a person at the time when it is killed (*m*).

A person is not justified in killing his neighbour's dog or cat which he finds on his land unless the animal is in the act of doing some injurious act which can only be prevented by its slaughter (*n*). And it has been held that if a person sets on his lands a trap for foxes and baits it with such strong-smelling meat as to attract his neighbour's dog or cat on to his land to the trap, and such animal is thereby killed or injured, he is liable for the act, though he had no intention of doing it, and though the animal ought not to have been on his property (*o*).

Even though it is straying.

Injury done by traps.

Numerous instances might also be given of conversion, *e.g.*, the appropriation of goods by a bailee, or where one finding anything refuses to give it up to the real owner on demand made ; or where a tenant severs fixtures from the premises of which he is tenant and appropriates them to his own use. On "conversion" the student is again referred to the distinction already noticed between it and a simple trespass (*p*).

Instances of conversion.

A person can be guilty of an act of conversion by his agent ; and the ratification of a prior act of conversion originally unauthorized will amount to a conversion by the person so ratifying it, provided the person doing the act professes at the time to be doing it as his agent, and this is an ordinary doctrine applying not merely to conversion, but to other matters generally (*q*). Thus if A. meddles with the goods of B. and takes them away, professing to act in so doing for C., who gave him no instruction or authority to do so, but C. afterwards acknowledges and ratifies the act, it amounts to his

Conversion may be by an agent's act, and even by ratification.

(*m*) Addison on Torts, 469, 470.

(*n*) Ibid.

(*o*) *Townsend v. Watken*, 9 East, 277.

(*p*) *Ante*, p. 272.

(*q*) See 1 S. L. C. 379-333 ; and see as to ratification of an agent's act generally, *ante*, p. 107.

conversion. But, in order to make a ratification have this effect, it must be with the full knowledge of the nature of the act committed, or with an intention to adopt that act at all events (*r*), so that where a landlord gave a broker a warrant to distrain for rent, and the broker took away and sold a fixture and paid the proceeds to the landlord, who received them without inquiry, but yet without any knowledge of the broker's irregularity, it was held that no such authority appeared as would sustain an action against the landlord (*s*).

When a demand is necessary to enable a person to maintain an action for conversion.

If a person in any way unlawfully meddles with and takes away the goods of another, an act of conversion is at once committed, and an action for such conversion may be maintained immediately against him. Thus in the recent case of *Cochrane v. Rymill* (*t*), the plaintiff advanced money to one Peggs on a bill of sale of his effects. The defendant, an auctioneer, without notice of the plaintiff's rights, by the direction of Peggs, sold the effects, and after deducting money he had advanced Peggs on account, paid the whole balance to him. The plaintiff sought to recover the value of the goods on the ground of their conversion by the defendant, and it was held that the plaintiff was entitled to recover, for the dealing with the property and sale by the defendant amounted to a conversion (*u*). But if goods come to a person's hands lawfully, in the first instance, and he detains them, to enable the owner to maintain an action for conversion, he must first make a demand for such goods, and then, on refusal to deliver them, he

(*r*) 1 S. L. C. 381.

(*s*) *Freeman v. Rosher*, 13 Q. B. 780.

(*t*) 27 W. R. 176, 40 L. T. 744.

(*u*) See also hereon *Hollins v. Fowler*, L. R. 7 H. L. 757; 20 W. R. 808; *Ganly v. Ledwidge*, 10 Ir. Reps. (C. L.) 33. It would, however, appear that if in *Cochrane v. Rymill* the goods had been sent to the defendant, the auctioneer, in the ordinary and usual course of business the decision would have been different (see *National Mercantile Bank v. Hampson*, L. R. 5 Q. B. Div. 177; 28 W. R. 424; also *Taylor v. McKeand*, *Weekly Notes*, 15 May, 1880; 28 W. R. 628).

may sue for the conversion (*x*). This demand for, and refusal of, the goods furnishes evidence of a conversion of them either then or at some time previously (*y*).

There are, however, some cases in which a person is justified in refusing to deliver up goods in his possession though he is not the owner of them, and in which his refusal will not render him guilty of a conversion. Thus, if goods are deposited in a person's hands for another, but subject to a certain charge in some third person's favour, here the depositee is justified in refusing to deliver the goods over to the owner of them until he has ascertained whether such charge does or does not exist. And, of course, with still greater force, if the depositee has himself some claim in the nature of a lien, he is justified in retaining the goods until such lien is satisfied. If, however, the lien is disputed, and the owner brings an action to recover the goods, he can, under the Judicature Act, 1875, at once obtain possession of them on paying into court the amount of the lien to abide the result of the action (*z*). And if a person has goods of another and leaves them with his servant, and demand of them from the servant is made by the owner, here the servant is justified in refusing to deliver them up until he has had an opportunity of receiving his master's instructions upon the subject (*a*).

When a person is justified in refusing to deliver goods to the owner.

Where a person is in doubt which of two or more persons demanding goods of him is the true owner to whom he ought to deliver them, the course open to him is to interplead, that is, take certain steps to have it decided between those parties which of them is the one entitled. There was always a process of interpleader in equity, but this necessitated the person

Interpleader, what it is, &c.

(*x*) *Thorogood v. Robinson*, 6 Q. B. 772.

(*y*) *Wilton v. Girdlestone*, 5 B. & Ald. 847.

(*z*) 38 & 39 Vict. c. 77, Order LII. r. 6.

(*a*) Addison on Torts, 464.

1 & 2 Wm. 4,
c. 58.

in doubt filing a bill there, so that, if an action was brought against him by one of the parties, and he did not know whether that person or the other was entitled, his only course to obtain relief was to file a bill of interpleader. An Act was therefore passed, known as the Interpleader Act (b), which provides that upon application by a defendant in an action of assumpsit, debt, detinue, or trover, shewing by affidavit that he himself claims no interest in the subject-matter of the suit, but that he believes or supposes it to be in some third person, that he does not in any way collude with such third person, and that he is ready to bring into court or pay, or dispose of the subject-matter of the action as the Court may direct, the Court may order the third person to appear and maintain or relinquish his claim, and in the meantime stay proceedings in such action (c). The Act also contains a special provision as to interpleader, in the case of sheriffs and other officers seizing goods in execution of legal process, providing that upon a claim being made by a third person to the goods seized, the sheriff or other officer may at once make an interpleader application to the court from which the process has issued (d). After this it was provided by the Common Law Procedure Act, 1860 (e), that interpleader might be granted though the titles of the claimants had not a common origin.

Provision of
the Judicature
Act, 1875, on
interpleader.

On this subject, the Judicature Act, 1875, now provides as follows: "With respect to interpleader, the procedure and practice now used by the courts of common law under the Interpleader Acts, 1 & 2 Wm. 4, c. 58, and 23 & 24 Vict. c. 126, shall apply to all the divisions of the High Court of Justice" (f).

III. Justifica-
tion

There may be many cases in which the commission

(b) 1 & 2 Wm. 4, c. 58.

(c) Sect. 1.

(d) Sect. 6.

(e) 23 & 24 Vict. c. 126, ss. 12-18.

(f) 38 & 39 Vict. c. 77, Order I. r. 2.

of a trespass to goods is justifiable, as has incidentally appeared in some of the foregoing remarks. "If a man's goods and chattels obstruct me in the exercise of my right of way, I have a right to remove them. If he places a horse and cart in the way of the access to my house, or before the door, so that I cannot drive up to it, I have a right to lay hold of the horse and lead him away, and, if necessary, to whip him to make him move on. So if a person's goods are placed on my ground I may lawfully remove them; and if his cattle or sheep come upon my land I may chase them and drive them out" (*g*). All these form instances of the justification of a trespass.

Instances of justification given in Addison on Torts.

It is perfectly justifiable to kill a naturally ferocious animal which is found at large, *e.g.*, a lion or a tiger, but this does not extend to justify a person killing a ferocious dog simply found at large (*h*). But it is perfectly justifiable for a person who is attacked by a dog to kill it in self-defence, or to kill it when it is chasing sheep and cattle, and they cannot be preserved without (*i*).

When justifiable to kill another's animal.

It is justifiable for the police to detain any dogs found at large without an owner, and if any dog is of an actually dangerous disposition, application may be made to justices, who may order it to be destroyed (*k*).

Detention of dogs found at large, or their destruction.

Cases in which a person is justified in refusing to give up goods, though belonging to the person making the application for delivery to him, have already been mentioned (*l*). These cases cannot be called the justification of a conversion, but rather cases in which acts, though apparently constituting a conversion, do not

(*g*) Addison on Torts, 457.

(*h*) *Ante*, pp. 280, 281.

(*i*) *Ibid.*

(*k*) 34 & 35 Vict. c. 56.

(*l*) *Ante*, p. 283.

actually amount to it. So also with regard to the justification of a trespass, perhaps those cases would be more correctly described as cases in which acts, though apparently constituting a trespass, do not actually amount to it.

An act done accidentally may be excusable.

Although a person does what is apparently an unjustifiable injury to another's property, he may find an excuse for it in shewing that it was the result of unavoidable accident; as if a man is riding along the streets, and accidentally, and without any fault on his part, his horse runs away, and does injury, he is not liable (*m*). So again, on the same principle, if a person is walking along the streets, and accidentally slips and falls against and breaks a window, he is not liable for the damage done. But if, in either of these cases, at the time of the accident, the person was doing an unlawful act, *e.g.*, committing an assault, he would be liable (*n*).

IV. Miscellaneous points.

Self-defence is a natural act open to every man, and if a person has actual possession of goods or other personal property, and another wrongfully attempts to take the same from him against his will, he is perfectly justified in using all force necessary for the purpose of defending his own possession, and preventing the act of trespass or conversion; he must, however, use no more force than is, under the circumstances of the case, necessary (*o*).

Recaption, definition of.

And even if a person is wrongfully dispossessed of his goods, he has the right of recaption. Recaption may be defined as a remedy by the act of the party, consisting in the right of the true owner of goods to

(*m*) *Hammack v. White*, 5 L. T. Rep. (N.S.) 676; and see *Vaughan v. Taff Vale Ry. Co.*, 5 H. & N. 679.

(*n*) See *Ibid.*

(*o*) *Broom's Coms.* 218; judgment in case of *Reg. v. Wilson*, 3 A. & E. 825.

follow them into the hands of another, and actually retake them from that other and repossess himself thereof (*p*). And a person to exercise this right of recaption, if the taker has removed the goods on to his own land, may enter thereon and take them, and will commit no trespass in so doing; but in exercising this right he must be careful, and not do any act that may render him in his turn an aggressor—he must not use any undue force, must not effect the retaking in a riotous manner, and must not commit a breach of the peace.

How a person is justified in effecting a recaption.

But although (as stated above) if a man actually takes goods away, and places them on his land, the owner may enter and retake them, yet the mere fact that goods which have been actually wrongfully taken away are on another's land will not justify the owner in entering on such land to retake them; he must shew how they have got there. If, however, the goods so wrongfully taken are found in a fair or on a common, then the mere fact of their being there justifies the owner in retaking them (*q*).

When trespass to goods is committed, or a conversion of them takes place, the person possessed of them at the time of the committing of the wrongful act is generally the person entitled to maintain an action in respect of it. But in the case of a bailment of goods, there being one interest in both the bailor and the bailee, the rule in the case of many tortious acts is that either or both of them may maintain an action in respect of the tortious act (*r*). Thus, if goods are let out by A. to B., and a trespass is committed in respect of them by a third person, C., whereby they are destroyed or permanently and materially damaged,

Generally the person possessed of goods at the time of trespass or conversion is the person to sue.

But in case of bailment sometimes bailor and bailee may both sue.

(*p*) Brown's Law Dict. 302.

(*q*) Broom's Coms. 218, 219.

(*r*) Per Parke, B., *Reg. v. Vincent*, 21 L. J. (N.C.) 109; see also *ante*, p. 104.

B. may sue in respect of the direct loss to him, and the bailor A., who is entitled after the determination of the bailment, may sue for the ultimate injury done to him. To entitle the bailor, however, in such a case to sue, the injury done must be of a permanent nature (s).

Where the
bailee only
can sue.

But where a conversion takes place in respect of goods the subject of a bailment, and the bailee has a right to them for some fixed and specific period yet unexpired, here the bailor cannot sue in respect of the conversion, but the action must be by the bailee; unless, indeed, the very conversion occurs by the tortious act of the bailee which determines the bailment (t). Thus, for instance, if furniture is let out for a year by A. to B., and wrongfully taken away and appropriated by C., the bailor A. cannot sue for this conversion, for the bailee B. is the person to sue; but if B. wrongfully sells the goods to C., who takes possession of them, this determines the bailment, and the bailor A. can at once sue C.

Remedy for
trespass to
goods.

The legal remedy for a trespass was originally either by action of trespass for damages for the direct injury done, or an action of trespass on the case for the injury, not direct, but consequential, and this was, in fact, the only difference in the two forms of action. The system of pleading under the Judicature Act, 1875 (u), now, however, entirely does away with all such distinctions (and, indeed, this distinction of forms of action had ceased long before), and in respect of a trespass committed to goods, the proper remedy is by an action to recover damages for the tortious act.

Remedies for
wrongful con-
version.

With regard, however, to cases in which the tortious

(s) *Hall v. Pickard*, 3 Camp. 187; *Mears v. London and South Western Ry. Co.*, 11 C. B. (N.S.) 850.

(t) *Fenn v. Birtleston*, 7 Ex. 159.

(u) 38 & 39 Vict. c. 77.

act amounts not merely to an act of trespass, but to the conversion of goods, that is, to the actual taking away and wrongful appropriation of them, or where goods are wrongfully detained by a person from the true owner, though all distinctions in the forms of action are now quite done away with, yet it will be useful to note the former remedies and the present position. In cases of conversion, the action brought was an action of trover (so called because founded on the supposition, generally a mere fiction, that the defendant had found the goods in question (*x*), and the claim of the plaintiff was not for the return of the goods, but to recover the value of them. In the case of wrongful conversion now, though there is no such thing as an action of trover, yet the remedy may still well be called an action in the nature of an action of trover, being to recover the value of them as formerly.

Former action
of trover.

But when goods were wrongfully detained from a person, there was another action that he might bring, called an action of detinue, being to recover either damages for their detention or the actual return of the goods detained (*y*). It was in the option of the defendant, on a verdict against him, either to return the goods or pay their value; but by the Common Law Procedure Act, 1854 (*z*), it was enacted that the plaintiff might apply to the Court or a judge to order execution to issue for the return of the particular goods without giving the defendant the option of retaining them on paying their value, and the Court or a judge might at discretion so order (*a*).

Former action
of detinue.

So now, therefore, though the Judicature Act, 1873, has, as before stated, entirely done away with all dis-

(*x*) Brown's Law Dict. 366.

(*y*) Ibid. 118.

(*z*) 17 & 18 Vict. c. 125.

(*a*) Sect. 78; see also *post*, part iii. ch. i. pp. 360, 361, and particularly note (*i*) as to relief always given in Chancery.

tinctions in forms of actions, yet an action may still be brought for the return of the goods detained, which may well be styled an action in the nature of an action of detinue.

Where an injury has been committed to the goods and chattels of a person who then dies, the right of action survives to his executors or administrators, forming an exception to the maxim, *Actio personalis moritur cum personâ* (b).

(b) 4 Edward 3; 25 Edward 3; and 43 Edward 3; see other exceptions to the maxim, *ante*, p. 260, and *post*, pp. 338-341.

CHAPTER IV.

OF TORTS AFFECTING THE PERSON (c).

WE have in the two preceding chapters considered the subject of Torts to Property ; in this and the next chapter we proceed to the subject of Torts to the Person, which may be said to be still more important than torts affecting property, because every one does not possess property for a tort to be committed in respect of ; but these torts affecting the person may equally be committed on any one. The different torts affecting the person are numerous, and those which may most usefully be considered appear to be the following :

Torts to the person are more important than torts to property.

1. Assault and battery.
2. False imprisonment and malicious arrest.
3. Malicious prosecution.
4. Libel and slander ; and
5. Seduction and loss of services.

Assault and battery are always classed together because they are acts closely connected, and, in fact, depending on each other, for though an act may be an assault without amounting to a battery, yet a battery must comprise an assault, and so it is most usual to find that an assault and battery take place simultaneously. An assault may be defined as the unlawful laying of hands on another person, or an attempt or offer to do

I. Assault and battery.

Definition of an assault.

(c) Some of the torts ranged under this head in the present chapter and the one next following are sometimes styled Torts affecting the Reputation ; but it does not appear necessary to introduce this further division in a work like the present, as torts particularly affecting the reputation necessarily more or less affect the person, for the reputation appertains to the person.

Definition of
a battery.

a corporal hurt to another, coupled with a present ability and intention to do the act (*d*). A battery may be defined as the actual striking of another person, or touching him in a rude, angry, revengeful, or insolent manner (*e*). We will now proceed to notice the essentials to constitute an assault, and some instances of assault; and then the essentials to constitute a battery, and the distinction between the two torts and their combination.

What acts will
be sufficient
to constitute
an assault.

To constitute an assault by a mere attempting or offering to do an act, it is stated in the definition that there must be a present ability and intention to do the act attempted or offered to be done. This means that it is not sufficient for a person to offer to do the act, unless he apparently is both able to and intends to do it. Thus, "holding up a fist in a threatening attitude sufficiently near to be able to strike; presenting a gun or pistol, whether loaded or unloaded, in a hostile and threatening manner, within gun-shot or pistol-shot range, and near enough to create terror and alarm; riding after a man with a whip, threatening to beat him, or shaking a whip in a man's face," are all acts of assault (*f*), for the person in all these cases has the apparent power of doing the act he threatens to do, and the intention of doing it. But if, in the foregoing instances, though the person threatens the act, yet he has not the then present ability to perform what he threatens, *e.g.*, if, holding up his fist, he is yet not near enough to strike, or, presenting a gun or pistol, is out of gun-shot or pistol-shot range, here no assault is committed. Again, in any of these instances, even although the person has the ability to do the act he threatens to do, yet, if he shews from his words or conduct that he does not mean to do the act, *e.g.*, if he says, were it not for

(*d*) See Brown's Law Dict. 34; *Read v. Coker*, 13 C. B. 860.

(*e*) Brown's Law Dict. 34.

(*f*) Addison on Torts, 119.

some event he would strike or would shoot, here no assault is committed (*g*).

The definition of assault also shews that a tort may be committed by a mere touching or laying on of hands, and this is so however slight may be the touching, for "the law cannot draw the line between different degrees of violence, and therefore totally prohibits the lowest stage of it, every man's person being sacred, and no other having the right to meddle with it in any, even the slightest manner" (*h*). There are, however, some few acts, consisting in the touching of another person, which from their very nature are not assaults, *e.g.*, if one has to push through a crowd, he has of necessity to touch others; but, unless he does it with roughness or violence, this is no tort, but an act which he is justified in doing (*i*).

An assault may be committed by a mere touching, however slight.
Except in a few cases.

In the foregoing remarks, some instances of assault have already been given. The following acts have also been held to be assaults, and furnish apt instances :

Instances of cases held to be assaults.

The riding after a person and obliging him to run away into a garden to avoid being beaten (*k*).

The forcing a person to leave premises by threats of violence if he did not do so (*l*).

Where two persons were fighting, and one of them accidentally struck a third person (*m*). This of course proceeds upon the principle that the person was doing an unlawful act in fighting. Had he not been doing so, then he would not have been liable for what was a

(*g*) Addison on Torts, 119, 120.

(*h*) 3 Bl. Com. 120, quoted in Broom's Coms. 674, 675.

(*i*) Addison on Torts, 120.

(*k*) *Martin v. Shoppee*, 3 C. & P. 373.

(*l*) *Read v. Coker*, 22 L. J. (C.P.) 201.

(*m*) *James v. Campbell*, 5 C. & P. 372.

pure accident; so that where a person threw a stick which accidentally hit another, it was held that it was fair to presume that the stick was thrown for a proper purpose, and therefore that defendant was not liable (n).

The cutting off of the hair of a pauper in the work-house by force and against his will (o).

An assault cannot be committed by a merely passive act.

A person cannot be guilty of an assault by acting in a merely passive manner; so that where a policeman obstructed persons from entering a room, it was held that this was no assault by him (p).

The definition of a battery (q) shews that the striking or touching must be in a rude, angry, revengeful, or insolent manner, to constitute it a battery. If, therefore, the touching is not in this way, it will only amount to an assault.

Distinction between an assault and a battery.

The distinction, therefore, between the two acts of assault and battery may be said to be that the assault is a lesser offence than the other, that there may be an assault without a battery, by simply touching the person of another without any violence, or by a threatening without the carrying out of the threat; but that in every battery there must have been an assault preceding it, and therefore, in cases of battery, there is a combination of the two torts, which are rightly described together as assault and battery.

Definition of mayhem, and what will and will not amount to it.

Assault and battery may sometimes be of such an aggravated kind as to amount to an actual wounding of the person, or to constitute the offence called mayhem. Mayhem (or maihem) has been described as "the

(n) *Alderson v. Waistell*, 1 C. & K. 358; see also as to the principle stated in the above paragraph, *ante*, p. 286.

(o) *Forse v. Skinner*, 4 C. & P. 239.

(p) *Jones v. Wylie*, 1 C. & K. 257.

(q) *Ante*, p. 292.

violently depriving another of the use of such of his members as may render him the less able in fighting to defend himself or to annoy his adversary, *e.g.*, the cutting off, or disabling, or weakening a man's hand or finger, striking out his eye or fore-tooth, or depriving him of those parts the loss of which in all animals abates their courage" (*r*). But the doing of an injury that only detracts from a person's appearance is not considered as mayhem, but only as wounding, because it does not weaken him, but only disfigures him.

Notwithstanding that an assault or battery may have been committed abroad, out of the jurisdiction of the court, yet the party injured has his remedy here (*s*); thus, in the case of *Mostyn v. Fabrigas*, just cited below, it was held that an action might be maintained against the governor of Minorca for an injury to the person of the plaintiff committed there. And although, in the case of a tort committed abroad, it happens that it could not, according to the law of the country where committed, be sued upon there until after certain penal proceedings had been taken in respect of it, yet, as that only goes to the procedure, it does not at all affect the remedy here (*t*).

An action may be brought here for an assault committed abroad. *Mostyn v. Fabrigas*.

There are, however, many cases in which, though an assault and battery may have been committed, yet such acts may, under the circumstances, be justifiable, and such cases of justification may chiefly be ranged under two heads, viz. (1) Where done in defence of person or property; and (2) Where allowed by reason of the defendant's peculiar position.

Assault and battery may sometimes be justifiable.

Now, as to defence, this is a justification of a very extended nature, for not only is a person justified in

Justifiable in defence of person.

(*r*) Brown's Law Dict. 223, 224.

(*s*) *Mostyn v. Fabrigas*, 1 S. L. C. 652; Cowp. 161.

(*t*) *Scott v. Lord Seymour*, 1 H. & C. 219.

But the defence must not be more than is necessary under the circumstances.

striking another in his own defence, but also in defence of husband, wife, child, relative, or even neighbour or friend (u), and as these last terms are very wide, it seems almost, if not entirely, correct to say that a person is justified in assaulting another in defence either of himself or others. But the nature of the assault and battery done in defence must be carefully observed, for some extreme act of defence being more than was necessary from the nature of the assault it was done in defence of, is not justifiable, *e.g.*, if one attempts to hit another, that other is perfectly justified in warding off the blow and striking a blow of the same nature in defence, but he is not justified in using some offensive weapon, and materially injuring the person, as by striking with a sword or knife (x). In every case in which justification on this ground is set up as a defence, the original act to prevent which it was necessary to resort to defence must be looked to, and a person is not justified in going beyond mere defence, and avenging himself, as by not being content with warding off a blow, but following it up by fresh and unnecessary blows. Where a justification for an assault and battery is set up on the ground of defence to the person, such defence is called a plea of *son assault demesne* (y).

Justifiable also in defence of property.

Assault and battery, also, in defence of one's property, whether real or personal, is perfectly justifiable (z); for if a person attempts to dispossess another of his goods, that other is fully justified in using means to prevent him doing so, and laying hands on him for that purpose. And so, also, if the attempt is to dispossess another of his land, that other is justified in committing an assault and battery for preventing

(u) Addison on Torts, 125, 126.

(x) See *Cockroft v. Smith*, 11 Mod. 43, quoted in Addison on Torts, 122.

(y) Brown's Law Dict. 335.

(z) 3 Bl. Com. 120; Addison on Torts, 122; see *ante*, pp. 261, 286.

the attainment of that object. If, however, a person obtains peaceable entry on another's land, the owner is not justified in forthwith assaulting him for the purpose of ejecting him therefrom, but he must first request him to go, and then, if he will not do so, proceed to eject him, using only as much force as is necessary (a).

And here, again, must be noticed—as in cases of defence of the person—that the act in defence of one's property must not be of an excessive character, for if it is more than is necessary under the circumstances, then it is not justifiable, nor is it justifiable to do an act in defence of property which may manifestly tend to injure the party (b). And particularly it is provided by statute (c) that any person causing to be set, or knowingly suffering to be set, upon his lands any spring-gun, man-trap, or other engine calculated to destroy life, with the intent of destroying or doing grievous bodily harm to trespassers, shall be guilty of a misdemeanor.

But again the defence here must not be greater than is necessary under the circumstances.

Now, as to assault and battery being justifiable by reason of a person's peculiar position. There are many cases in which the law gives a person a direct power of laying hands on the person of another and assaulting him, and a primary instance of this may be seen in the chastisement sometimes awarded to offenders by flogging. And, irrespective of any sentence of the law, a person, by the relationship in which he stands towards another, has a justification for assault and battery committed on that person, *e.g.*, a father naturally has a right to reasonably chastise his children, and so, also, has a master to reasonably

Justifiable on account of a person's peculiar position.

E.g., a father with regard to his child.

(a) *Polkinhorn v. Wright*, 8 Q. B. 197; per Parke, B., *Harvey v. Brydges*, 14 M. & W. 442.

(b) *Collins v. Renison*, Say. 138.

(c) 24 & 25 Vict. c. 100, s. 31, re-enacting 7 & 8 Geo. 4, c. 18.

chastise his apprentices, and a schoolmaster his scholars, but the chastisement must not be excessive (*d*). A master or captain of a ship has also a right by virtue of his position to imprison or reasonably chastise any of the sailors who behave in a mutinous or disorderly manner, or refuse or neglect to obey his lawful and proper orders, but any chastisement must be reasonable (*e*); and a beadle, or other person employed in that capacity in a place of worship, is justified in laying hands on and forcibly removing from that place any person who by his conduct is disturbing the congregation (*f*).

Malice is not an *essential* in assault and battery.

It necessarily appears that in actions for assault and battery it is not at all essential that malice should exist. Malice may, of course, be shewn, and may operate to inflame the injury done, and increase the amount of the damages; but a wanton, or thoughtless, or negligent act, without the slightest malicious intent, may equally constitute an assault and battery.

An assault and battery may be committed indirectly.

Assault and battery may also be committed indirectly as well as directly; thus, where the defendant threw a lighted squib which fell on a stall in the street, and the keeper of the stall for his own protection threw it off, and it then exploded and injured the plaintiff, it was held that the defendant, the original thrower, was liable, for, that a person is liable for the natural and probable consequences of his own act (*g*). So if a person in the street whips another's horse, and thus causes him to run over or otherwise injure any one, such person is liable for the assault and battery thus committed (*h*).

(*d*) See hereon *Winterburn v. Brooks*, 2 C. & K. 16.

(*e*) *Broughton v. Jackson*, 21 L. J. (Q.B.) 265; *Noden v. Johnson*, 20 L. J. (Q.B.) 95.

(*f*) *Burton v. Henson*, 10 M. & W. 105; *Williams v. Glenister*, 2 B. & C. 699.

(*g*) *Scott v. Sheppard*, 1 S. L. C. 466; 2 Blackstone, 892.

(*h*) Addison on Torts, 41, 42.

A person may proceed either civilly or criminally in respect of an assault, and the period of limitation for bringing any action in respect of such a tort is four years (i). It has already been noticed, however, in considering the subject of torts generally, that sentence will not be passed in a prosecution for an assault if an action for the same assault is also pending; that if a conviction on summary proceedings takes place that bars further civil proceedings; and that if a magistrate dismisses a charge of assault his certificate of dismissal will operate to bar any further proceedings, civil or criminal, in respect of it (k).

Remedies in respect of assault and battery.

If a man assaults his wife, she has no right of action against him, her remedy being to prosecute him, or to apply for him to be bound over to keep the peace, or the assault and battery may constitute cruelty sufficient to obtain a separation order under the Matrimonial Causes Act, 1878 (l), or to found proceedings for judicial separation. It has been recently decided that no action is maintainable by a divorced wife against her former husband for an assault and battery committed during the coverture (m). What is stated in this paragraph applies not only to assault and battery but to any tort under such circumstances.

A wife cannot sue her husband in respect of a tort committed to her during coverture.

Even though she has since obtained a divorce.

False imprisonment may be defined as some unlawful detention of the person, either actually or constructively (n). The difference between an actual and constructive detention of the person is this, that while an actual detention is a detention by forcible means, the constructive is not, but may consist in a mere show of authority or force, *e.g.*, if an officer informs a man that he has a legal process against him and that he must

II. False imprisonment, definition of. Distinction between an actual and a constructive detention.

(i) 21 Jac. 1, c. 16, s. 3.

(k) *Ante*, pp. 250, 251.

(l) 41 Vict. c. 19.

(m) *Phillips v. Barnett*, L. R. 1 Q. B. Div. 436; 45 L. J. (Q.B.) 277.

(n) See Broom's Coms. 709, 710.

accompany him, and, accordingly, although no hand is laid on him, he goes with the officer, this amounts to an imprisonment (o).

Imprisonment often justifiable.

It being, therefore, understood what will constitute a false imprisonment, we will proceed to consider particular cases in which imprisonment is allowed by the law, so that it will not be a false but a justifiable and proper imprisonment.

Detention by a person because of his position as a father.

Firstly, it may be noticed that there are various persons who are, from their position, naturally justified in detaining certain persons to whom they stand in a peculiar relation, *e.g.*, a father his child, a husband his wife, or a commanding officer his inferior.

Detention for a criminal offence.

Secondly, for criminal offences, persons are liable to be arrested and imprisoned, in some cases only by a warrant from competent authority for that purpose, and in some cases by any one without any warrant at all.

Definition of a warrant and mode of acting thereunder.

A warrant is a precept under hand and seal to an officer to arrest an offender to be dealt with according to due course of law (p). It is obtained on application to a magistrate or justice, and is then delivered to a constable who makes the arrest, having it with him at the time to produce if required, as if he has not so got it with him he stands in the same position as if there were no warrant (q).

As to the liability of justices.

If a justice does an act within his jurisdiction, *e.g.*, granting a warrant to arrest an offender in respect of an act for which, had he been guilty, the justice would have had full power to grant it, he is not liable to any

(o) *Grainger v. Hill*, 4 B. & C. 212; *Wood v. Lane*, 6 C. & P. 774.

(p) *Brown's Law Dict.* 383.

(q) *Galliard v. Laxton*, 31 L. J. (M.C.) 123.

action in respect of it, unless the act was done maliciously, and without reasonable and probable cause (*r*); but if he does an act without jurisdiction, *e.g.*, sending an offender to prison, where he has, even although the offender were guilty, no power to imprison, he is liable quite irrespective of malice; but no action can be brought against him in respect of it until after the conviction has been quashed (*s*). No action can, however, be brought against a justice for anything done by him in the execution of his office, until one calendar month's notice in writing is given to him, with particulars of the intended action (*t*), and he has then, before the action is commenced, a right to tender to the person injured a sum of money by way of amends, and, after action, to pay such sum into court either in addition to the previous tender or instead of the previous tender; and if such sum is not accepted by the plaintiff, the fact of the tender and payment into court may be given in evidence at the trial, and the jury, if of opinion that the plaintiff is not entitled to damages beyond the sum so tendered and paid into court, shall give a verdict for the defendant, and the defendant's costs shall be paid out of the amount, and the balance, if any, paid to the plaintiff (*u*). Any right of action against a justice for anything done by him in the execution of his office, is statute barred after six months from the date of the act complained of having been committed.

A month's notice must be given before action.

Statute barred after six months.

A constable doing an act in pursuance of a legal warrant is not liable to an action for false imprisonment, but if the warrant were granted without jurisdiction then the law was, formerly, that he, in the same way as the justice granting it, and, indeed, all persons concerned in its execution, was liable to an action for

As to the liability of constables.

(*r*) 11 & 12 Vict. c. 44, s. 1.

(*s*) Sect. 2.

(*t*) Sect. 9.

(*u*) Sect. 11.

Special provision for their protection when acting under a warrant.

He is usually entitled to notice before action.

The person obtaining a warrant is not liable for false imprisonment, but may be for malicious prosecution.

Cases in which a constable may arrest without warrant.

false imprisonment. A constable is, however, in such a case now protected, it being provided that no action shall be brought against him before demanding a copy of the warrant under which he acted, and that if that is given, then, although the person aggrieved may bring his action against the constable and the justice granting the warrant, the production of such warrant shall entitle the constable to a verdict (x). A constable, when liable to an action in respect of anything done in the execution of his office, is entitled to notice before action brought (y).

A person who lays a complaint before justices, and thereupon obtains a warrant, is not liable to an action for false imprisonment, though it turns out that the complaint was erroneous, or there was no jurisdiction for the granting of the warrant (z). He may, however, sometimes be liable for malicious prosecution (a).

A constable may not generally arrest another without a warrant for that purpose, but there are some special cases in which he may. Particularly he may do so when he sees a felony committed, or has reasonable ground for suspecting that a felony has been committed, and also reasonable ground to suspect that the person he arrests is the committer of the felony (b). If a person makes a reasonable charge of felony against another, a constable is justified in arresting such alleged culprit and is not liable to any action for false imprisonment for so doing, though the person making the complaint and requiring the arrest may be so liable (c). The following are also cases in which a constable is justified in

(x) 24 Geo 2, c. 44, s. 6.

(y) See Addison on Torts, 715, 716.

(z) Broom's Coms. 718.

(a) As to which see *post*, pp. 308-310.

(b) He may not, however, arrest without warrant merely on suspicion of a misdemeanor.

(c) Broom's Coms. 715, 716.

arresting without warrant: Where an assault is committed in his presence, or to prevent a breach of the peace (*d*); where a person is found committing malicious injuries to property (*e*); where a person is found committing an indictable offence in the night between the hours of nine P.M. and six A.M. (*f*); where a person is found collecting a crowd round another's house, or continually ringing another's bell, because such acts are likely to lead to a breach of the peace (*g*).

A private person may also in some few cases arrest another, and not be liable to any action for false imprisonment. Particularly he may do so if he sees a felony committed, or if a felony has been actually committed and he has just and reasonable cause for suspecting the person he arrests to be guilty of it. There is, however, a great distinction between an arrest without warrant in respect of a felony, by a constable and by a private individual, for "in order to justify the private individual in causing the imprisonment, he must not only make out a reasonable ground for suspicion, but he must prove *that a felony has actually been committed* by some person or another, and that the circumstances were such that any reasonable person acting without passion or prejudice would have fairly suspected that the plaintiff had committed it or was implicated in it; whereas a constable, having reasonable grounds to suspect that a felony has been committed, *although in fact none has been*, is authorized to detain the person suspected until he can be brought before a justice of the peace to have his conduct investigated (*h*).

A private person is justified in arresting another in some few cases, as when he sees a felony committed,

A private person may also arrest another actually fighting in the streets, to prevent the continuance of a Or to prevent, a continuance of a breach of the peace.

(*d*) Addison on Torts, 135.

(*e*) 24 & 25 Vict. c. 97, s. 61.

(*f*) 14 & 15 Vict. c. 19.

(*g*) Addison on Torts, 136.

(*h*) Ibid. 132-134.

Special powers
of pawnbrokers
as to arrest.

breach of the peace (*i*). And if a pawnbroker to whom any property is offered has reasonable ground for believing that an offence has been committed in respect of it, he is justified in arresting the person offering such property, and taking him and the property before a justice of the peace (*k*).

Detention in
civil cases.

Thirdly. In civil cases persons are sometimes liable to be arrested and imprisoned.

Contempt of
court.

Imprisonment by reason of contempt of court may be ranged under this head, although of course it may equally occur in criminal cases. Contempt of court consists in any refusal to obey an order or process of a court of competent jurisdiction, or in offending against particular statutes which render such offending a contempt of court, or in interfering with or violating established rules of court, or in behaving in a disrespectful or improper manner towards the court or any judge or officer thereof (*l*). Instances of contempt are easy to find, *e.g.*, non-obedience to a judgment for specific performance, or an injunction granted by the High Court of Justice, or the interfering, by marrying or otherwise, with a ward of the court, or by threatening a witness, so as to prevent him giving, or to intimidate him in giving, his evidence (*m*).

Imprisonment
for debt may
still occur.
32 & 33 Vict.
c. 62.

Imprisonment for debt is said to be abolished (*n*), but nevertheless it may occur in various cases. The Act upon this subject is the Debtors Act, 1869 (*o*), which enacts that, with the exceptions thereafter mentioned, no person shall after the commencement of the Act (*p*)

(*i*) Addison on Torts, 135.

(*k*) 24 & 25 Vict. c. 96, s. 103.

(*l*) Brown's Law Dict. 80. See also *Reg. v. Castro*, L. R. 9 Q. B. 219.

(*m*) See hereon, Snell's Principles of Equity.

(*n*) See the title of 32 & 33 Vict. c. 62, "An Act for the abolition of imprisonment for debt," &c.

(*o*) 32 & 33 Vict. c. 62.

(*p*) 1 January, 1870.

be arrested or imprisoned for making default in payment of a sum of money (*q*). The exceptions are as follows :

1. Default in payment of a penalty, or sum in the nature of a penalty, other than a penalty in respect of any contract. Six cases of special exceptions.

2. Default in payment of any sum recoverable summarily before a justice or justices of the peace.

3. Default by a trustee or person acting in a fiduciary capacity, and ordered to pay by a Court of Equity any sum in his possession or under his control.

4. Default by a solicitor in payment of costs when ordered to pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the same in his character of an officer of the court making the order.

5. Default in payment for the benefit of creditors of any portion of a salary or other income in respect of the payment of which any court having jurisdiction in bankruptcy is authorized to make an order.

6. Default in payment of sums in respect of the payment of which orders are in this Act authorized to be made. It is provided, however, that in all or any of these excepted cases no person shall be imprisoned for a longer time than one year, and nothing in the section is to alter the effect of any judgment or order of any court for payment of money, except as regards the arrest and imprisonment of the person making default in paying such money (*r*). In which, however, the imprisonment is not to be for beyond one year.

With regard, however, to the exceptions above numbered 3 and 4, it is now provided by the Debtors Act, 1878, that the Court or judge may inquire into

(*q*) 32 & 33 Vict. c. 62, s. 4.

(*r*) Ibid.

the circumstances of the case, and is to have a discretionary power as to imprisoning (s).

Also power to commit to prison for six weeks on proof of means.

In addition to the foregoing cases, the same Act also provides that any person making default in payment of any debt, or instalment of any debt, due from him in pursuance of any order or judgment, may be committed to prison for a term not exceeding six weeks, on its being proved that he has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same (t). The application to commit to prison under this provision is made by a summons called a judgment summons, and in the superior courts is made to a judge in chambers. In an inferior court, it must be made in open court before the judge or his deputy (u).

When a defendant in a civil action may be arrested.

The Debtors Act, 1869, also contains an enactment as to the arrest of a defendant in a case totally distinct and apart from imprisonment for debt, it being provided (x) that where the plaintiff in any action in any of her Majesty's superior courts of law proves at any time before final judgment by evidence on oath to the satisfaction of a judge of one of those courts that (1) the plaintiff has good cause of action against the defendant to the amount of £50 or upwards, (2) that there is probable cause for believing that the defendant is about to quit England unless he is apprehended, and (3) that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action (y), the judge may order such defendant

(s) 41 & 42 Vict. c. 54. This Act came into operation on its passing 13th August, 1878.

(t) 32 & 33 Vict. c. 62, s. 5.

(u) Sect. 5.

(x) Sect. 6.

(y) This being a matter very difficult to prove, orders for the arrest of a defendant under this section are not at all frequently granted.

to be arrested and imprisoned for a period not exceeding six months, unless and until he has sooner given the prescribed security, not exceeding the amount claimed in the action, that he will not go out of England without the leave of the Court. Where the action is for a penalty, or sum in the nature of a penalty, other than a penalty in respect of any contract, it is not however necessary to prove that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action, and the security given (instead of being that the defendant will not go out of England), is to be to the effect that any sum recovered against the defendant in the action shall be paid, or that the defendant shall be rendered to prison.

If a person obtains an order for arrest under the foregoing provision by any false statement or wrongful suppression of facts, he may, in addition to the false imprisonment, be liable to an action for malicious arrest. Malicious arrest may be described or defined as a tortious act consisting in the malicious (z) arrest of another without reasonable or probable cause.

It will be noticed that the provision as to the arrest of a defendant is quite distinct and different from the foregoing provisions as to imprisonment for debt; in the former there is an action and a judgment, or order for payment, and the object of the imprisonment is to get satisfaction of it; in the latter there is no debt adjudged by the Court to be due, and the object is to prevent the defendant from leaving the country. The student should carefully remember this distinction, as it is important (a).

(z) Using the word "malicious" in the sense ascribed to malice in law, *post*, p. 308.

(a) It seems that since the Judicature Acts, 1873 and 1875, the practice at Common Law and in Equity in respect of the arrest of a debtor on mesne process is assimilated, and a writ of *ne exeat* in respect of an equitable debt will not be granted unless the applicant brings his case within the terms of the 6th section of the Debtors Act, 1859: *Drover v. Beyer*, 49 L. J. (App.) 37.

III. Malicious prosecution.

Malicious prosecution may be defined as a tortious act consisting in the unjust and malicious prosecution of one for a crime, or the unjust and malicious making one a bankrupt without any reasonable or probable cause (*b*).

Three essentials in an action for malicious prosecution.

There are three essentials necessary to entitle a person to maintain an action for malicious prosecution, viz.: 1. Malice on the part of the defendant; 2. The absence of any reasonable and probable cause for the prosecution (*c*); and 3. That the prosecution was determined in the plaintiff's favour if from its nature it was capable of being so determined (*d*).

As to the first essential, viz., malice, it is important to properly understand the meaning of the word.

Difference between malice in law and malice in fact.

Malice in law is all that is required to exist in malicious prosecution.

Malice is said to be of two kinds, viz., malice in law and malice in fact (*e*). The latter means what we ordinarily understand by the term, and consists of some act of spite either against some particular individual or the public at large; but the former does not simply mean ill-will against a person or the public at large, but signifies a wrongful act done intentionally, without any just cause or excuse, *e.g.*, the unwarrantable striking of a blow likely to produce death; for, in such cases, there is no necessity to prove any particular spite or ill-will, for the act speaks for itself (*f*). Now, the malice that is required to exist to support an action for malicious prosecution is only of this latter kind (*g*); so that, in saying that malice is an essential, it is not meant that any particular spite or ill-will must be

(*b*) Brown's Law Dict. 224.

(*c*) See as to these two essentials per Williams, J., in *Barber v. Lessiter*, 7 C. B. (N.S.) 186.

(*d*) *Barber v. Lessiter*, 7 C. B. (N.S.) 186; *Basché v. Matthews*, L. R. 2 C. P. 684.

(*e*) Per Bailey, J., in *Bromage v. Prosser*, 4 B. & C. 255.

(*f*) Brown's Law Dict. 224; Broom's Coms. 723, 724.

(*g*) Per Parke, J., in *Mitchell v. Jenkins*, 5 B. & A. 595; Broom's Coms. 729.

shewn to have existed, but simply that there was the intentional doing of a wrongful act.

The second essential, viz., the absence of any reasonable or probable cause, is important, and what is reasonable and probable cause is a question to be determined by the judge on the circumstances of every particular case (*h*), for there may be many cases in which, though a person fails to sustain his accusation, yet there may have been very good grounds for the institution of his proceedings, for he may have been compelled to withdraw from such proceedings by reason of inability to find his witnesses, the death of a material witness, or other circumstances (*i*).

Whether there was reasonable and probable cause so as to prevent a prosecution being malicious is a question for the judge in each particular case.

Although a prosecution at the outset may not be malicious, yet it may afterwards become so by reason of the continuance of it after positive knowledge of the innocence of the accused (*k*).

A prosecution not at the outset malicious may become so.

The third essential, viz., that the prosecution was determined in the plaintiff's favour if it was capable of being so determined, scarcely calls for any comment here. From it it will be seen that if a person has been actually convicted, or has been actually adjudicated a bankrupt, he cannot maintain this action whilst the conviction or adjudication stands against him, for that furnishes at once irrebuttable evidence of reasonable and probable cause. To entitle a person, therefore, in such a case, to maintain his action, he must shew that the conviction or adjudication has been reversed or superseded (*l*).

A person cannot sue for malicious prosecution if there is a conviction on it standing against him.

The malicious prosecution of a civil action, though without any reasonable or probable cause, does not have

No action lies for malicious prosecution of a civil action.

(*h*) *Watson v. Whitmore*, 14 L. J. Ex. 41; see *Low v. Collum*, Ir. Reps. 2 Q. B. D. 15; Broom's Coms. 729.

(*i*) *Willans v. Taylor*, 6 Bing 186; Addison on Torts, 614.

(*k*) Per Cockburn, C.J., in *Fitz-John v. Mackinder*, 30 L. J. (C.P.) 264.

(*l*) Addison on Torts, 207, 208.

Nor by a subordinate against his officer for bringing him to court-martial.

the same effect as the malicious criminal prosecution or the malicious obtaining of an adjudication in bankruptcy, and no action will generally lie in respect of it. No action, also, will lie by a subordinate for malicious prosecution against his commanding officer for bringing him to court-martial (*m*).

(*m*) See generally hereon, Addison on Torts, 199-212.

CHAPTER V.

OF TORTS AFFECTING THE PERSON—(*continued*).

IN the same way that the torts of assault and battery are usually classed together, so also frequently are those of libel and slander; but there are many and material distinctions between the two torts, and it will be advisable to consider the subject in the following manner :

1. The law particularly as to libel.
2. The law particularly as to slander.
3. The differences between libel and slander.

Libel may be defined as a tortious act, consisting in the malicious defamation of another, made public by writing or printing, or pictures or effigy, in such a manner as to expose him to public hatred or contempt, ridicule, reproach, or ignominy (*n*). As an assistance to this definition, and as tending to shew what acts will be libellous, it may be stated that everything in writing, or printing, or any picture or effigy, which tends to imply reproach to any person, or to in any way derogate from his character by imputing to him any bad actions or vicious principles, or to abridge his comforts or respectability, will amount to a libel, even although practically and substantially the libel complained of may not have caused the plaintiff any special or peculiar damage, or, indeed, any real damage at all (*o*), by which is meant that, even without proof of

IV. Libel and slander.

Definition of libel.

To entitle a person to maintain an action for a libel it is not necessary that it should have caused him any special injury.

(*n*) See various definitions from which this is compiled given in Starkie on Slander and Libel, 3, 4.

(*o*) Starkie on Slander and Libel, 151-172.

special damage, the plaintiff may be entitled to a verdict and nominal damages, though, of course, in every case, proof of special injury done to him by the libel will tend to increase the amount of the damages that will be awarded by the jury.

Instances of
words held
to be libellous.

Very many instances of words held to be libellous might be enumerated, and a few may usefully be given. In one case it was held that to write or print of a person that he was a swindler was a libel (*p*); in another that to write of a person that he was a black sheep or a blackleg was a libel (*q*); and in another that to write of a person that he had been blackballed on an election for members of a club was libellous (*r*). There may also be many cases in which the words used by the defendant, and complained of by the plaintiff as libellous, though not apparently on their face so, yet, by the special and peculiar sense in which they may be taken in any particular case, may be actually libellous; thus in one case the plaintiff complained that the defendant had libelled him by calling him a truck-master, and the Court held that this might possibly constitute a libel, and that it must be for the jury to decide whether or not, under the circumstances, the word complained of was used in a defamatory sense (*s*). There may also be many cases in which a person may be libelled, although he is not actually named, if it clearly appears that he is the person against whom the defamatory matter was aimed (*t*); as, for instance, by describing the plaintiff or his place of residence or business, or giving other particulars which would lead persons to apply the libel to him; and it is not necessary to prove that the whole world would take the matter as applying to the plaintiff, but it is

(*p*) *P'Anson v. Stuart*, 1 T. R. 748.

(*q*) *McGregor v. Gregory*, 11 M. & W. 287.

(*r*) *O'Brien v. Clement*, 16 M. & W. 159.

(*s*) *Homer v. Taunton*, 29 L. J. (Ex.) 318.

(*t*) See *P'Anson v. Stuart*, 1 T. R. 748.

quite sufficient to shew that some would (u). If, however, the words used are words that no ordinary reader could put a libellous construction on, the plaintiff cannot, by alleging that they have a particular intent, make them libellous. Thus in a recent case the libel complained of consisted of an advertisement stating that one M. (the plaintiff) was not any longer authorized to receive subscriptions for a certain institute, and the plaintiff brought this action, alleging that the meaning of the advertisement was that he, the plaintiff, had falsely assumed, and pretended to be authorized, to receive subscriptions on behalf of such institute. The Court held that no action was maintainable here, as the words made use of would not bear any libellous interpretation (x).

To entitle a person to succeed in an action for libel he must prove the publication of it, and this, indeed, must be proved before any evidence can be given of the contents of the libel (y); for it is not sufficient to render a person liable to an action for libel that he wrote the defamatory matter, for if he has kept it in his possession, and not in any way shewn it to a third person, he has done no harm. For instance, to write a letter to a person containing defamatory matter concerning him is not actionable if it reach his hands without being seen by any third person; so that even where such a letter, simply folded and not sealed, was delivered to a third person to carry to the other, and might have been opened and read by him but was not, it was held that no action was maintainable (z). The publication of a libel may occur in many different ways, as by the defendant actually with his own hand giving the libel to another,

The publication of a libel must always be proved, for it is no offence to write defamatory matter and keep it private.

What will amount to a publication.

(u) *Bourke v. Warren*, 2 C. & P. 307.

(x) *Mulligan v. Cole*, L. R. 10 Q. B. 549; 44 L. J. (Q.B.) 153; see also the *Capital and Counties Bank v. Henty*, L. J., Notes of Cases, 29 May, 1880, p. 74.

(y) Starkie on Slander and Libel, 415.

(z) *Clutterbuck v. Chaffers*, 2 Stark. 471.

by inserting a libellous advertisement in a newspaper (*a*), or by writing and sending a letter to a third person (*b*).

A person ignorantly and unwittingly publishing a libel is not liable to an action.

Where a porter in the course of his business and employment delivered parcels containing libellous handbills, it was held that, although he was the actual publisher of the libel, yet he was not liable to an action in respect of it, he being ignorant of the contents of the parcel (*c*).

Malice in law is an essential to constitute a libel.

Our definition of libel states it to be the *malicious* defamation of another (*d*). Malice, therefore, is an essential to constitute a libel, but by the word malice used here is not meant malice in its ordinary sense of spite or ill-will, but malice in law as before described in treating of malicious prosecution (*e*), viz., the intentional doing of a wrongful act without just cause or excuse. Malice, therefore, is properly said to be an essential of libel, but it is inferred, and need not be proved, for "where words have been uttered, or a libel published, of the plaintiff, by which actual or presumptive damage has been occasioned, the malice of the defendant is a mere inference of the law from the very act; for the defendant must be presumed to have intended that which is the natural consequence of his act" (*f*).

But it is inferred and need not be proved.

Circumstances may, however, rebut malice, and make a communication privileged.

But there may be cases in which special circumstances repel the presumption of malice that would otherwise exist, and when there are such special cir-

(*a*) *Brown v. Croome*, 2 Stark. 297.

(*b*) *Phillips v. Jansen*, 2 Esp. 624. Sending the libel in a letter addressed to the wife of the person libelled has been held to be a sufficient publication; *Wenman v. Ash*, 22 L. J. (C.P.) 190. See, generally, as to publication, Starkie on Slander and Libel, chap. 19.

(*c*) *Day v. Bream*, 2 M. & Rob. 54.

(*d*) *Ante*, p. 311.

(*e*) *Ante*, p. 308.

(*f*) Starkie on Slander and Libel, 451.

cumstances they prevent the matter complained of being a libel, although had they not existed it would have been, and in such cases the matter is said to be a privileged communication.

A privileged communication may therefore be defined as a communication which on its face would be libellous, but is prevented from being so by reason of circumstances rebutting the existence of malice (*g*), and it occurs where any person having an interest to protect, or having a legal or moral duty to perform, makes a communication to another (such other having a corresponding interest or duty) in protection of his interest or in performance of his duty; here, although the communication may contain matter that would ordinarily be actionable, yet here it is not actionable if the communication is fairly and honestly made in *bonâ fide* belief of its truth and without any gross exaggeration (*h*). A good instance of a communication privileged by reason of being made in discharge of a duty, occurs in the case of a master giving a character to his servant. It is quite true that a servant cannot compel his master to give him a character (*i*), but, although this is so, it is clearly the master's moral or social, though certainly not his legal, duty to do so; and if he, therefore, gives a character which he *bonâ fide* believes to be true, he is protected, and although it is in reality false it is a privileged communication (*k*). Thus A. has had a servant B., who, on applying for a new place, refers his intended new master to A., who, believing that B. has, during his service with him, stolen certain articles, replies to the new master's inquiries to that effect; here, if A.

Definition of a privileged communication.

An instance of a privileged communication occurs in the case of a master giving a character to his servant.

(*g*) *Wright v. Woodgate*, 2 C. M. & R. 573.

(*h*) *Harrison v. Bush*, 25 L. J. (Q.B.) 25; *Whiteley v. Adams*, 33 L. J. (C.P.) 89.

(*i*) *Carol v. Bird*, 3 Esp. 201; Smith on the Law of Master and Servant, 347.

(*k*) *Weatherstone v. Hawkins*, 1 T. R. 110; *Fountain v. Boodle*, 3 Q. B. 5.

bonâ fide believed this statement to be true, and has made it without any exaggeration, under the circumstances, although B. can prove himself totally innocent, he has no right of action against him.

But a character voluntarily given is not privileged

If, however, a master without being applied to for a character, volunteers one, here he is performing no duty, and it will not be a privileged communication, but he will be liable if it is false (l).

Other instances of privileged communications.

Fair comments on any public proceedings, or on the conduct of public men, such as members of parliament and the like, and fair and honest criticisms and reviews, are privileged communications, provided that in all these cases such comments, criticisms, or reviews are of an honest, fair, and *bonâ fide* character; if, however, they are not, but appear to be really malevolent, then they are not privileged (m). The law on the subject has been well stated thus: "The editor of a public newspaper may fairly and candidly comment on any place or species of public entertainment, or the persons who perform there, but it must be done without malice or view to injure or prejudice the proprietor in the eyes of the public. If fairly done, however severe the censure, the justice of it screens the editor from legal animadversion; but if it can be proved that the comment is malevolent and exceeds the bounds of fair opinion, then it is a libel and actionable" (n).

Statements made by members of parliament in the House are privileged, but such members may be liable if they subsequently print and publish such statements (o).

Fair reports of proceedings in parliament or in courts

(l) *Pattison v. Jones*, 8 B. & C. 578.

(m) See Starkie on Slander and Libel, 223 *et seq.*; see also *Dwyer v. Esmonde*, Ir. Reps. 2 Q. B. (App.) 243.

(n) Per Lord Kenyon in *Dibdin v. Swan*, 1 Esp. 26, cited in Addison on Torts, 181.

(o) See Starkie on Slander and Libel, 223 *et seq.*

of justice are privileged, unless the proceedings are of an absolutely scandalous, blasphemous, or indecent nature (*p*). It has, however, been held that the meetings of poor law guardians are not necessarily public, and that therefore a report of proceedings at such a meeting affecting an individual must not be considered to be privileged (*q*).

The statements of a witness in a court of justice are absolutely privileged, and this even although the witness goes somewhat beyond what he was asked. That this is so is well shewn by the recent case of *Seaman v. Netherclift* (*r*). The facts in that case were as follows: *Seaman v. Netherclift.* The plaintiff was a solicitor, and had attested a will, which was afterwards called in question in the Probate Court. The defendant, who was an expert in matters of writing, gave it as his evidence that the testator's signature was not genuine, but the jury found in favour of the will. Soon afterwards the defendant was engaged in another case as an expert, and being cross-examined as to his evidence in the will case, he added, as a gratuitous statement, to justify himself, "I believe that will to be a rank forgery, and shall believe so to the day of my death." This was the defamation complained of, but the Court decided that the words fell within this class of privileged communications, as being words spoken in the course of evidence.

And with regard to what will be a court, so as to render a witness not liable for his statements, it may be noticed that it has been decided that a court of inquiry instituted by the commander-in-chief of the army, under the Articles of War, to inquire into a complaint made by an officer of the army, is such a court, and therefore that statements, whether oral or written, *Dawkins v. Lord Rokeby.*

(*p*) See Starkie on Slander and Libel, 193, 218.

(*q*) *Purcell v. Sowler*, L. R. 2 C. P. Div. 215; 46 L. J. (C.P.) 308.

(*r*) L. R. 1 C. P. Div. 540; 2 C. P. Div. 53; 46 L. J. (C.P.) 128.

made by an officer summoned to attend before such court, are absolutely privileged, even although made *malâ fide* and with actual malice, and without reasonable and probable cause (s).

It is for the judge to decide whether a particular matter is privileged.

In many cases of what are alleged to be privileged communications, on the ground of moral or social duty, it is often a difficult matter to decide whether or not the matter shall be admitted to be such a duty as to render the communication privileged; in all such cases it is for the judge to decide whether the principle can be applied to the particular case (t).

Many cases that would *primâ facie* appear to be privileged may yet on particular facts not be.

In cases of privileged communication, however, it is usually open to the plaintiff to shew that, notwithstanding that the communication would ordinarily be privileged, yet that the defendant has been guilty of actual malice, *i.e.*, malice in fact (u). Thus, it has been pointed out that a master is privileged in giving a character to his servant, but yet, if he knowingly gives a false character, here there is actual malice, and there cannot possibly be any privilege.

The truth of a libel affords a complete answer in a civil action.

The truth of a libellous imputation affords a complete answer to any action for damages, because the action is brought by the plaintiff to free his character from such imputation, which he cannot be entitled to do if the imputation is actually true (x); and where the truth of the imputation is not thoroughly and strictly proved, but it is substantially or to a great extent, this, though not sufficient to form a defence, may

(s) *Dawkins v. Lord Rokeby*, L. R. 7 H. L. 744, 42 L. J. (Q.B.) 8. It has also been held that reports made by a military officer for the information of the commander-in-chief are privileged: *Dawkins v. Lord Paulet*, L. R. 5 Q. B. 94; 39 L. J. (Q.B.) 53.

(t) Per Erle, C.J., in *Whiteley v. Adams*, 15 C. B. (N.S.) 418.

(u) *Wright v. Woodgate*, 2 C. M. & R. 573. As to malice in fact, see *ante*, p. 308.

(x) Starkie on Slander and Libel, 20, 21.

go in mitigation of damages (y). Libel is, however, punishable, not only civilly but also criminally, by indictment or information; and in a criminal prosecution the truth of the libel was formerly no defence, for the object of a criminal prosecution is to a great extent the preservation of public peace and good order, which cannot be maintained if one man is allowed to publish of another everything that may chance to be true of that person, so that, whether true or false, the imputation may have equally mischievous results, and consequently be equally a public wrong (z). This state of the law is, however, now to a considerable extent altered, it having been provided that the truth of a libel shall form a defence to a criminal prosecution if it is also for the public benefit that the matters complained of should be published (a).

Effect of the truth of a libel in a criminal prosecution for it.

6 & 7 Vict. c. 96, s. 6.

The Act last referred to (b) also contains two other important provisions on the subject of libel. The first of such provisions is that in any action for defamation it shall be lawful for the defendant (after notice in writing of his intention so to do duly given to the plaintiff at the time of filing or delivering the plea (c) in such action) to give in evidence, in mitigation of damages, that he made or offered an apology to the plaintiff for such defamation before the commencement of the action, or so soon afterwards as he had an opportunity of doing so, in case the action shall have been commenced before there was an opportunity of making or offering such apology (d).

Provision of 6 & 7 Vict. c. 96, as to apology generally.

The other of such provisions is that in an action for a libel contained in any public newspaper or other periodical publication, it shall be competent to the

Provision of 6 & 7 Vict. c. 96 as to libel in a public newspaper, &c.

(y) *Chalmers v. Shackell*, 6 C. & P. 475.

(z) See Starkie on Slander and Libel, 21.

(a) 6 & 7 Vict. c. 96, s. 6.

(b) 6 & 7 Vict. c. 96.

(c) Statement of defence under the present practice.

(d) Sect. 1.

defendant to plead that such libel was inserted therein without actual malice and without gross negligence, and that before the commencement of the action, or, at the earliest opportunity afterwards, he has inserted in such newspaper or other periodical publication a full apology for the said libel, or if such newspaper or other periodical publication shall be ordinarily published at intervals exceeding one week, that he has offered to publish the said apology in any newspaper or other periodical publication to be selected by the plaintiff in such action; and that every such defendant shall upon filing such plea be at liberty to pay into court a sum of money by way of amends for the injury sustained by the publication of such libel (*e*). This latter provision is not, however, now of the importance it formerly was, as under the Judicature Act, 1875, money may be paid into court in all actions (*f*).

An action for libel must be brought within six years.

An action of libel may be brought at any time within six years of publication thereof (*g*).

If a person, to whom a libel is published, in his turn publishes it again, he is liable in respect of it, as well as the original libeller (*h*).

Definition of slander.

Slander may be defined as the malicious defamation of another person, not in writing, but simply by word of mouth (*i*). For ordinary slander the only remedy of the person slandered is to bring an action for damages, for the injury done to him is not so great as

(*e*) 6 & 7 Vict. c. 96, s. 2. By 8 & 9 Vict. c. 75, s. 2, it is provided that it shall not be competent for a defendant to plead apology as stated in the text, without at the same time making a payment of money into Court.

(*f*) 38 & 39 Vict. c. 77, Ord. xxx. r. 1. See Indermaur's Manual of Practice, 58, 59.

(*g*) 21 Jac. 1, c. 16, s. 3.

(*h*) *McPherson v. Daniels*, 10 B. & C. 273; *Tidman v. Ainslie*, 10 Ex. 63.

(*i*) For various definitions of slander, see Starkie on Slander and Libel, 3, 4.

by libel, which, being in writing or the like, is more lasting and permanent in its nature, while slander, being but by word of mouth, is, from its very nature, fleeting; but in some exceptional cases of slander, *e.g.*, where the words used are seditious, grossly immoral or blasphemous, or addressed to a magistrate with reference to his duties or whilst he is performing his duties, or uttered as a challenge to fight a duel or to provoke such a challenge, a criminal prosecution will lie (*k*). Cases in which a criminal prosecution will lie for slander.

As to what words will be sufficient to enable a person to maintain an action of slander, may be instanced words imputing a crime to any one, as generally that he is a thief, or particularly that he has committed such and such a wrongful act, but it is not necessary that the words used should be so extreme as that, and generally speaking any defamatory words causing damage will give rise to the action. On the other hand, there are many cases of words merely spoken which confer no right of action, although had they been written they would have (*l*). Words made use of charging another with having evil desires and inclinations, but not stating that they have been brought into action, are not actionable (*m*), but if they go beyond that, and charge another with actually having evil principles, then it seems they are (*n*). Instances of slander.

The facts to be proved in an action of slander will generally be three, viz., 1. The uttering of the slanderous words. 2. The malice of the defendant; and 3. The damages caused to the plaintiff. Facts to be proved in an action for slander.

The first matter will involve the point of whether or not the words are really defamatory; and to render them so they must be such that if not the whole world, What words will be defamatory.

(*k*) See Starkie on Slander and Libel, 587.

(*l*) *PAnson v. Stuart*, 1 T. R. 748.

(*m*) *Harrison v. Stratton*, 4 Esp. 218.

(*n*) *Prince v. Howe*, 1 Bro. P. C. 64.

at any rate some persons would have taken them in a defamatory sense (*o*). The question as to the meaning of the words used is,—in what sense did the person uttering them mean them to be understood? (*p*) But although words, if they stood by themselves, might be defamatory and actionable, yet it is quite possible that they may be controlled by other words made use of at the same time, so as to prevent them having the ordinary usual and primary meaning that they otherwise would have had (*q*).

The malice required is only malice in law.

The malice that is required is only malice in a legal sense, which will be implied if the uttering of the defamatory words is proved (*r*).

Special damage must be proved in an action for slander.

We have stated that the third essential of proof in all actions of slander will be the damages caused by the defamatory words, for generally speaking, unless the slander has been productive of damage, no action lies, in which respect slander differs from libel, for in the former we have pointed out that the plaintiff will at any rate be entitled to a nominal verdict, although he may not give one atom of evidence that the libel has caused him any injury (*s*). In some few cases this is also so in slander, and when so the words used are said to be words actionable in themselves, and they are as follows (*t*):

Except in three cases.

1. Imputing an indictable offence.

1. Where an indictable offence, or actual conviction thereof, is imputed, and it is not necessary that the crime should be technically described, for any words by which it would ordinarily be understood are sufficient (*u*); nor is it necessary to particularly specify

(*o*) *Ante*, pp. 312, 313.

(*p*) *Read v. Ambridge*, 6 C. & P. 308.

(*q*) *Shipley v. Todhunter*, 7 C. & P. 680.

(*r*) As to malice in fact and malice in law, see *ante*, p. 308.

(*s*) *Ante*, pp. 311, 312.

(*t*) See Starkie on Slander and Libel, 70.

(*u*) *Coleman v. Godwin*, 3 Doug. 90.

any crime, it is sufficient if a person says he has a right to have another punished (*x*). General terms of abuse, such as rogue, rascal, scoundrel, &c., are not words actionable in themselves, for they do not impute any precise and definite offence punishable in the courts of justice (*y*).

2. Where the words used impute to the defendant a contagious or infectious disorder, which may have the effect of excluding him from society (*z*), *e.g.*, the leprosy or the itch. It is not, however, sufficient to say that a person has at some past time had such a disorder (*a*).

2. Imputing
a contagious
disorder.

3. Where the words used impute to the defendant some incompetence in his office, trade, profession, or calling, or tend to injure or prejudicially affect him therein. Thus, words imputing to a solicitor in any way that he is a knave (*b*), or that he deserves to be struck off the rolls (*c*), come within this category. So, also, to say of a doctor that none of the other medical men in the town will meet him, is in itself actionable (*d*), and so are words imputing indigent circumstances to a banker (*e*). The great criterion to ascertain whether or not words do come within this heading is, do they directly touch or affect the plaintiff in his office, trade, profession, or calling? if they do, then they are actionable in themselves (*f*).

3. Imputing
incompetence
in a trade,
profession, or
employment.

To render words actionable in themselves as coming within this third class, it matters not how humble the calling or employment of the plaintiff may be; thus,

(*x*) *Francis v. Rose*, 3 M. & W. 191.

(*y*) *Starkie on Slander and Libel*, 74.

(*z*) *Ibid.* 108, 109.

(*a*) *Carlake v. Mapledoram*, 2 T. R. 473.

(*b*) *Day v. Buller*, 3 Wils. 59.

(*c*) *Per Kenyon, C.J., Phillips v. Jansen*, 2 Esp. 624.

(*d*) *Southee v. Denny*, 1 Ex. 196.

(*e*) *Robinson v. Marchant*, 7 Q. B. 918.

(*f*) *Starkie on Slander and Libel*, 119; see *Black v. Hunt*, Ir. Reps. 2 Q. B. D. 10.

menial servants have been held entitled to maintain an action for words spoken against them in their employment without any proof of special damage (*g*).

Proof of special damages however, always given when possible, for the sake of enhancing the damages.

It is only important to prove that words come within one of these three classes when special damage cannot be proved; and, of course, proof of special damage is when possible always given for the purpose of enhancing the amount of the damages.

The truth of slander is an answer to an action for it.

The truth of slanderous matter will form a perfect defence to any action in respect of it on the like principle that, as has been stated (*h*), the truth of a libel may be set up as a defence to an action for damages. This point is extremely well put in Mr. Starkie's work on Slander and Libel (*i*), as follows: "It is essential to the claim for damages that the imputation should be *false*; for, as in point of natural justice and equity, no one can possibly have any claim or title to a false character, so also would it be contrary to the principles of public policy and convenience to permit a man to make gain of the loss of that reputation which he had forfeited by his misconduct. *In foro conscientiae* it is no excuse that the slander is true; but in compassion to men's infirmities, and because if the words spoken are true, the individual of whom they are spoken cannot justly complain of any injury, the law allows the truth of the words to be a justification in an action for slander."

The principle of privileged communications applies equally to cases of slander.

The remarks that have been made under the head of

(*g*) *Connors v. Justice*, 13 Ir. C. L. R. 451. In addition to the three cases given above in which an action of slander may be maintained without proof of special damage, it may be mentioned that calling a woman a whore, or otherwise imputing unchastity to her, is by itself actionable in the city of London courts; and so calling a woman a strumpet in the city of Bristol is actionable there by the custom of the place (see Fisher's C. L. Digest (tit. "Defamation"), 3061, 3062).

(*h*) *Ante*, p. 318.

(*i*) Page 69.

libel on the subject of privileged communications apply equally to cases of slander (*k*).

A special and peculiar kind of defamation occurs in what is called *scandalum magnatum*, of which it is sufficient to say that it consists in the spreading of false reports against peers and certain other great officers of the realm, and that it is subjected to peculiar punishments by various ancient statutes (*l*).

An action of slander may be brought at any time within two years after the uttering of it (*m*).

Limitation for
action of
slander.

A person repeating a slander uttered by another renders himself liable in respect of it, and cannot in any way discharge himself by giving up the name of the author or first utterer of it, for both are liable (*n*).

A person
repeating a
slander is
liable as if he
were the
utterer of it.

The differences between libel and slander have appeared in discussing respectively each of those torts, and all that is therefore necessary under this third heading is to summarise those differences. They are as follows :

Differences
between libel
and slander.

1. There is the difference in the very nature of the two torts which appears from their respective definitions (*o*).

2. Libel, from its nature, is of a more lasting, and slander of a more fleeting character, so that libel is a tort of a more serious nature than is slander (*p*).

3. It is not essential to prove special damage in an

(*k*) See *ante*, pp. 314–318.

(*l*) See Brown's Law Dict. 321.

(*m*) 21 Jac. 1, c. 16, s. 3. As to the construction put upon this provision, see Starkie on Slander and Libel, 382, 383.

(*n*) *McPherson v. Daniels*, 10 B. & C. 273; *Tidman v. Ainslie*, 10 Ex. 63.

(*o*) *Ante*, pp. 311, 320.

(*p*) *Ante*, pp. 320, 321.

action of libel (*q*), but it is in slander, except in the three cases already given (*r*).

4. Libel is punishable both civilly and criminally : but slander, generally speaking, only civilly (*s*).

5. Libel is by statute barred after six, but slander after two, years (*t*).

V. Seduction
and loss of
services.

“ An action of seduction is in our law founded upon a fiction—the basis of this action when brought, even by a father, to recover damages for the seduction of his daughter, having been uniformly placed from the earliest times, not upon the seduction itself, which is the wrongful act of the defendant, but upon the loss of service of the daughter, in which service the parent is supposed to have a legal right or interest. It has, accordingly, always been held that in an action for seduction loss of service must be alleged and must be proved at the trial, or the plaintiff will fail, notwithstanding the production of evidence conclusive as regards the guilt of the defendant ; for the wrong done by his act the law does not esteem *per se* as an *injuria*, using that word in its strict sense, but merely as *damnum sine injuria*, for which consequently an action will not lie ” (*u*).

The action of
seduction is
not for the
seduction, but
for the loss of
service.

The foregoing quotation shews lucidly enough the nature of the action commonly called an action of seduction. From it the student will carefully observe that although the action is said to be “ for seduction,” yet this is not strictly correct ; it is really for the loss of service that ensues from the antecedent act of seduction, and is therefore so called, for a parent or other

(*q*) *Ante*, p. 311.

(*r*) *Ante*, pp. 322, 323, where these three cases are stated.

(*s*) *Ante*, pp. 319–321.

(*t*) *Ante*, pp. 320, 325.

(*u*) Broom's Coms., 82, 83. As to *Damnum sine injuria*, see *ante*, p. 4.

person has no remedy because his daughter or other relative has been seduced (*v*). This may have injured him substantially in his position or in his feelings, yet it is not what the law considers as a legal injury, but constitutes an instance of the rule already explained (*w*) that *damnum sine injuria* will not be sufficient to enable a person to maintain an action.

Again, a woman cannot herself maintain any action in respect of her own seduction, for she has been a consenting party to the tort, and the maxim of our law, *Volenti non fit injuria*, deprives her of any remedy she might but for its existence have had. (*x*).

Did the law stop here there would, therefore, be no remedy for the tortious act of seduction, but—as stated in commencing the subject—this action is, in our law, founded upon a fiction, which is that, although the person seduced cannot maintain any action, nor can a parent in his character of parent, yet any person whether parent or not, between whom and the seduced party the relationship of master and servant exists, may sue for the loss of service that ensues from the pregnancy and illness consequent on the seduction, whereby the person is deprived of the services that should have been rendered to him, and to which he was entitled (*y*).

This action, therefore, can be maintained by a person who is purely and simply a master, but this is not the usual class of cases that occur, for in such, practically, the damages the master would recover would be but small. Actions of seduction usually occurring in our courts, are, where a parent or other person sues for the seduction and consequent loss of service to him of his daughter or other relative; and here, though

(*v*) *Satherwaite v. Duerst*, 5 East, 47, n.

(*w*) *Ante*, p. 4.

(*x*) See Broom's Legal Maxims, 265.

(*y*) Addison on Torts, 533.

The jury in an action of seduction generally look to the substantial object of the action.

he has to make out a state of service as existing between himself and the person seduced, yet this being made out technically, substantial damages may be given to the plaintiff very far beyond any real injury done by the loss of service, but as a *solatium* to the feelings of the plaintiff, and increased in amount according to the conduct of the seducer. The jury, also, undoubtedly, in most cases of seduction, look to the fact that, although the action is nominally for loss of service, yet, substantially, or probably, it is chiefly for the benefit of the seduced herself, it being, at any rate, the only means she has of obtaining such remedy from the seducer (z).

Points to be proved in an action of seduction.

In every action of seduction the points to be proved will be three, viz. :

1. The fact of the seduction and consequent illness and loss of service.
2. That the relation of master and servant existed between the plaintiff and the party seduced ; and
3. The damages sustained.

What will constitute the position of master and servant to enable a person to sue in this action.

With reference to the first and third points, it has already been pointed out that it is not the actual act of seduction which really gives rise to the action, but the illness and loss of service, and that the jury have a very wide discretion in awarding damages. The second point remains as to what will be sufficient proof of the relationship of master and servant, and as—âs has also been pointed out—it is not in simple cases of ordinary service that the action is usually brought, but in cases of parent and child, in which it is wanted to establish a

(z) Except indeed a bastardy summons for the maintenance of the child, as to which see 35 & 36 Vict. c. 65.

technical service, it is sometimes not easy of determination whether or not that relationship can be said to exist.

It is not at all necessary to shew that the seduced was actually employed in a regular routine of duty (a), for "very slight evidence of actual service, such as milking cows, making tea, nursing children, will suffice to prove the fact of actual service. And where a daughter is shewn to have been living with her father at the time of the seduction, forming part of his family, and liable to his control and demand, service will be presumed, and proof of acts of actual service will be unnecessary" (b). Where the plaintiff's daughter was seduced in his house and service in Ireland and the day after left the country pursuant to prior arrangements for America, and whilst in service there finding herself pregnant, returned to Ireland to the house of her sister, where she was confined, and after her confinement she returned to the house of the plaintiff; it was held that there was evidence to go to the jury of loss of service sufficient to sustain the plaintiff's action (c).

It is not necessary to shew that the seduced was in any regular routine of service.

And this relationship of master and servant must be shewn to have existed not only at the time of the illness and loss of service, but also at the time of the seduction (d), upon the principle that a master taking a servant who has already been seduced, takes her with the injury already done—it is not an injury committed during the time of his rights over her.

The relationship of master and servant must have existed at the time of the seduction.

The fact of the seduced party being a married

An action may be maintained for the seduction of a married woman.

(a) See *Griffiths v. Teetgen*, 15 C. B. 344; *Torrence v. Gibbins*, 5 Q. B. 297; *Rist v. Faux*, 32 L. J. (Q.B.) 386.

(b) Addison on Torts, 534; and as to the latter statement in the text, see *Maunder v. Venn*, M. & M. 323; *Jones v. Brown*, 1 Esp. 217; *Fores v. Wilson*, 1 Peake, 77; and per Coleridge, J., *Torrence v. Gibbins*, 5 Q. B. 300.

(c) *Long v. Keightley*, 11 Ir. Reps. C. L. 221.

(d) *Davies v. Williams*, 10 Q. B. 729.

woman does not prevent the action, for, provided she is separated from her husband and living with and serving her parent or other the person who brings the action, without any interference on the part of the husband, the plaintiff's rights are just the same as if she were not married (*e*). But if a daughter is in a house of her own, the fact of her father being there with her consent cannot place her in a subordinate position so as to confer on him any right of action (*f*), and if she is away in actual service to some third person, and does not come home regularly, but only occasionally, although she then renders services, this cannot give the parent any right to bring the action (*g*); but if she is generally at home, and simply away making a temporary visit when the seduction or the illness occurs, here the parent has his right of action, because he has a right to call for her services (*h*).

Effect of a
woman being
in the service
of her seducer.

If the person seduced is actually and substantially in the service of her seducer when the seduction takes place, no one will have any right to maintain the action, unless, indeed, the girl has been fraudulently lured away from her home, and taken into service for the purpose of seduction, in which case the parent, or person standing *in loco parentis*, will still have his remedy, because such a fraudulently arranged service does not put an end to the relationship of master and servant that before existed. In all such cases it will always be a question for the jury, whether there was a *bonâ fide* service between the girl and the defendant (if there was a *bonâ fide* service, the verdict must be for the defendant), or whether the service was arranged simply and expressly for the purposes of, and with a view to the accomplishment of, the seduction (if it was so

(*e*) *Harper v. Luffkins*, 7 B. & C. 387.

(*f*) *Manley v. Field*, 29 L. J. (C.P.) 79.

(*g*) *Thompson v. Ross*, 29 L. J. (Ex.) 1.

(*h*) *Griffiths v. Tectgen*, 15 C. B. 344.

arranged, the plaintiff will still be entitled to a verdict, notwithstanding such services (i).

It will always be a good defence to an action of this kind, that the plaintiff has by his own conduct brought about the evil he complains of, *e.g.*, if he has encouraged any improper intimacy between the parties, or has introduced the person seduced to, or encouraged her acquaintance with, persons of a known loose, dangerous or immoral character (k).

If the plaintiff has by his conduct brought about the seduction, he cannot maintain an action for it.

If a defendant proves that, although he was the seducer, yet he was not the father of the child of which she was delivered, no action lies against him (l).

Seduction, but defendant not the father of the seduced's child.

There are also cases in which an action can be maintained for loss of services arising quite otherwise than by seduction, for "every person who knowingly and designedly interrupts the relation subsisting between master and servant by procuring the servant to depart from the master's service, or by harbouring him and keeping him as servant after he has quitted his place and during the stipulated period of service, whereby the master is injured, commits a wrongful act, for which he is responsible in damages" (m). Thus, in the case of *Lumley v. Gye* (n), the plaintiff alleged in his declaration that he was lessee and manager of the Queen's Theatre, and that he had agreed with one Johanna Wagner to perform in his theatre for a certain time, with a condition that she should not sing or use her talents elsewhere during the term, without the plaintiff's consent in writing. That the defendant, knowing these facts, and maliciously intending to injure

An action for loss of services can be maintained quite irrespective of seduction.

Lumley v. Gye.

(i) See Addison on Torts, 535, 536, and remarks of Abbott, C.J., in *Speight v. Olivera*, 2 Stark. 495, there quoted and referred to.

(k) See, as an instance of this, *Reddie v. Scoolt*, 1 Peake, 316.

(l) *Eager v. Grimwood*, 16 L. J. (Ex.) 236.

(m) Addison on Torts, 532.

(n) 2 Ell. & B. 224; 22 L. J. (Q.B.) 463.

the plaintiff as lessee and manager of the theatre, whilst the agreement with Wagner was in force, and before the expiration of the term, enticed and procured her to refuse to perform, by means of which enticement and procurement of the defendant, Wagner wrongfully refused and did not perform during the term. On demurrer, the Court held that this shewed a good cause of action for the plaintiff, and that an action lies for maliciously procuring a breach of a contract to give exclusive personal service for a time certain, equally whether the employment has commenced or is only *in fieri*, provided the procurement be during the subsistence of the contract and produces damage, and that to sustain such an action it is not necessary that the employer and employed should stand in the strict relation of master and servant.

CHAPTER VI.

OF TORTS ARISING PECULIARLY FROM NEGLIGENCE.

IN the foregoing pages many matters depending on negligence have incidentally been touched on, as for instance, particularly in the chapter on Bailments, and therein of Common Carriers, which subject mostly involves negligent breaches of duties on the part of the bailee (o). The object of the present chapter is to treat particularly of the subject of Negligence, introducing some matters that have been before casually mentioned, and some that have not been treated of at all.

Many matters of negligence have incidentally been treated of in prior pages.

Negligence producing damage to another is in all cases a ground of action to the party suffering thereby, provided there is some obligation on the part of the negligent person to use care; but the question of what shall be considered negligence so as to render a person liable therefor is a question of fact for the jury, subject to rules of law or of common sense, according to which the measure of culpable negligence varies as the circumstances of each particular case differ; for in some cases a person is liable only for very extreme acts of negligence, in others for very slight acts of negligence (p); thus, to again refer to the subject of bailments, we have seen that a remunerated bailee may be liable for ordinary or for slight negligence, whilst a mere voluntary bailee is liable only for acts amounting

There must always be some obligation on the part of the negligent person to use care.

What is to be considered negligence is a question of fact for a jury.

(o) As to which, see *ante*, Part i. ch. iv. p. 89 *et seq.*

(p) See Brown's Law Dict. tit. "Negligence," 248.

to gross negligence (*q*). A person, too, may be liable not only for acts of negligence done in his own proper person, but also by those whom he employs, under the maxim, *Qui facit per alium facit per se* (*r*), for this is only reasonable—the person employing has the option of those whom he will employ, and if he employs negligent, careless, or unskilful persons, it is only fair and proper that he should be liable for their negligence, carelessness, or unskilfulness.

Mode of
considering the
subject.

The subject of Negligence may be conveniently considered under the following heads, viz. :

1. Negligence causing injury to the person.

2. Negligence causing injury to property, real or personal.

3. Defences to an action for negligence.

1. Negligence
causing injury
to the person.

If a person, through negligent driving, runs over or otherwise injures any person, he is liable for such injury, and this equally so whether the driving is by himself or by his coachman or other servant, and whether he is at the time in the vehicle or not, provided always that, in the case of a servant being the driver, he is acting in the course of his duty; for if this is not so—as, if the servant takes out the vehicle contrary to his master's orders—then the master is not liable (*s*). If, however, the servant is originally out in the course of his duty, and then disobeys his master's instructions, as by driving where he was told not to, the master is nevertheless liable (*t*).

(*q*) *Ante*, pp. 90, 91, and cases of *Coggs v. Bernard*, 1 S. L. C. 199, and *Wilson v. Brett*, 11 M. & W. 113, there quoted.

(*r*) See Broom's Legal Maxims, p. 784; Broom's Coms. 679, 687.

(*s*) *McManus v. Crickett*, 1 East, 106.

(*t*) *Seymour v. Greenwood*, 6 H. & N. 359; 7 H. & N. 355; *Storey v. Ashton*, L. R. 4 Q. B. 476; 38 L. J. (Q.B.) 223. See Addison on Torts, 100.

Where a vehicle is let out by a job-master to a person who appoints his own coachman, here, generally speaking, the job-master is under no liability, for the coachman is not his servant, but the servant of the person to whom the vehicle is let (u). In all cases in which it is desired to make one person liable for the negligent act of another, it is essential to shew that the person guilty of the negligence actually stood in the position of servant to the other (x); so that, where a contractor for building or other purposes employs a sub-contractor to carry out the work, who in his turn employs his servants, the original contractor is not liable for the negligence of such servants (y). So, if a person instructs builders or other workmen to pull down or alter his house, or do other work of a lawful and not necessarily dangerous character, he is not liable for their acts of negligence committed in the course of such work being done (z). If, however, the work is actually completed, and afterwards, through the negligent way in which it has been done, an injury happens to any one, then the owner may be liable; so that, for instance, where the plaintiff came to races, and paid money for the privilege of viewing such races from a stand erected for that purpose, and was injured through the negligent manner in which it had been constructed, it was held that the defendant who caused its erection and received the money for admission was liable in respect of such injuries (a). If, however, money is not paid in such a case, but the persons are received as visitors, it would then be the same as a man receiving visitors at his own house, as to which the law is, that he is not liable for any injury happening to them from some defect of which he

Liability in the case of a vehicle let out.

Or in the case of a sub-contractor.

(u) *Laugher v. Pointer*, 5 B. & C. 547; *Quarman v. Burnett*, 6 M. & W. 499.

(x) *Butler v. Hunter*, 31 L. J. (Ex.) 214.

(y) *Cuthbertson v. Parsons*, 12 C. B. 304; *Murray v. Currie*, L. R. 6 C. P. 24.

(z) *Butler v. Hunter*, 31 L. J. (Ex.) 214.

(a) *Francis v. Cockrell*, L. R. 5 Q. B. 184; *Ibid.* 501.

himself is not aware; though, if he is aware of the defect, and such defect is not necessarily observable, then it is his duty to warn the guest, and if he fails to do so, then he may be liable (*b*).

Liability in respect of dangerous goods.

Or animals.

If a person deposits with a carrier or other bailee goods of a dangerous character, and neglects to disclose that fact to such carrier or other bailee, he is liable for the consequences (*c*); and if a person negligently entrusts any machine, implement, or animal to a person unfit to take charge of it or to manage it, who from his unfitness does some injury, the person entrusting it to him is liable (*d*). And the same principle applies where a person negligently leaves about anything of a dangerous character, or which may do injury, for he is liable for all the reasonable and probable consequences arising from his negligence (*e*). If a person keeps some animal of a naturally ferocious nature, as a lion or a bear, he is liable for any injury such animal may do; but if not naturally of such a nature—*e.g.*, a dog—then to render the owner liable for an injury done to a person, proof not only of the animal's viciousness must be given, but also of the *scienter* or knowledge of the owner of such viciousness. Proof, however, of such *scienter* in the case of injuries to sheep or cattle is not now necessary (*f*).

An action for negligence may be maintained quite irrespective of any privity.

Where the negligence complained of arises out of a contract, persons besides the other contracting party may, nevertheless, sometimes maintain an action in respect of it, which fact depends upon the principle that privity is not at all requisite to support an action

(*b*) *Collis v. Selden*, L. R. 3 C. P. 495; *Southcote v. Stanley*, 1 H. & N. 247.

(*c*) *Farrant v. Barnes*, 31 L. J. (C.P.) 139; *Brass v. Maitland*, 6 E. & B. 470.

(*d*) *Dixon v. Bell*, 5 M. & S. 198.

(*e*) *Lynch v. Nurdin*, L. R. 1 Q. B. 36; *Illidge v. Goodwin*, 5 C. & P. 192.

(*f*) 28 & 29 Vict. c. 60; see *hercon ante*, pp. 279, 280.

ex delicto (g); thus, a medical man may be liable for the negligent treatment of his patient, although he was not called in by the patient, and was not to be remunerated by him (h).

Nuisances arising from negligence frequently cause ^{Injuries from nuisances.} direct injury to the person, *e.g.*, if in the course of necessary excavation to public roads a heap of stones is negligently left lying there, this constitutes a nuisance, and a person falling over such stones and being thereby injured has a right of action (i). And although any one has certainly a right within due bounds to do what he likes on his own property, yet if he has dangerous holes, shafts, pits, or wells, or the like thereon, it is his duty to protect any one coming lawfully on his premises; and if a person so lawfully coming thereon, through not being properly warned, guarded, and protected against such dangerous places, falls in them, or in any way injures himself through them, the proprietor is liable, unless the person with due caution or care might have himself prevented the accident (k).

It is provided by statute (l), that it shall not be lawful for any person to sink any pit or shaft, or to erect or cause to be erected any steam-engine, gin, or other like machine, or any machinery attached thereto, within the distance of twenty-five yards, nor any windmill within fifty yards, from any part of any carriage-way, or cart-way, or turnpike-road, unless the same shall be within some house, building, wall, or fence sufficient to screen the same from such way or road, so as to make it not dangerous to passengers, horses, or cattle. Within these prescribed distances it is no answer to an action for any injury arising there- ^{Liability for an injury arising from an engine, &c., erected near a public road.}

(g) *Ante*, pp. 251, 252, and cases there cited.

(h) *Ante*, p. 165; *Gladwell v. Steggall*, 5 Bing. N. C. 733.

(i) See *Ellis v. Sheffield Gas Consumers Co.*, 2 E. & B. 767.

(k) *Indermaur v. Dames*, L. R. 1 C. P. 274; Addison on Torts, 284.

(l) 5 & 6 Wm, 4, c. 50, s. 70, extended by 27 & 28 Vict. c. 75.

from to shew that the person injured was a trespasser at the time he sustained the injury (*m*). Subject, however, to the foregoing, a person is not liable for an injury happening to a person who is a trespasser at the time (*n*); and when an excavation is made beyond the before mentioned distance of twenty-five yards from a way or road, and does not immediately adjoin any footpath or public way of passage, so as to render it necessarily dangerous to the public, and a person must become a trespasser before he can reach such excavation, the owner of the land is not guilty of what the law considers negligence through not fencing it off, and is not liable to any person injured through it (*o*).

Where an injury done by several, one or all may be sued.

Where the injury complained of is caused by the negligence of several persons, the party injured may maintain his action against any one or all of them (*p*); and if he chooses to sue one only of them, that one has no right of contribution against the other or others of them, although such other or others may have been equally guilty with him (unless, indeed, it is some negligence arising out of contract), for there is no contribution between wrongdoers, the rule being *ex turpi causâ non oritur actio* (*q*).

The liability of carriers of passengers depends entirely upon the question of negligence.

The liability of carriers of passengers for injuries done to them in the course of the carrying turns entirely upon the point of negligence, their duty and contract being to carry safely and securely so far as by reasonable care and forethought is possible, and if they in any way fail in this they are liable (*r*). It is not, therefore, in every case of an injury to a passenger that the carrier will be liable, for he does not in any way warrant a

(*m*) Addison on Torts, 566.

(*n*) See, however, as to the setting of man-traps, spring-traps, dog-traps, &c., Addison on Torts, 124, 125.

(*o*) Addison on Torts, 566.

(*p*) *Moreton v. Hardern*, 4 B. & C. 223.

(*q*) *Merryweather v. Nixan*, 2 S. L. C. 546; 8 T. R. 186. See also *ante*, p. 255.

(*r*) *Ante*, p. 101.

passenger's safety, and when he has done everything prudence suggests an accident may still happen, thus there may be some latent defect in the vehicle which causes the accident, and which it was impossible, with the exercise of all due care, caution, and skill, to have discovered (s). Negligence is, therefore, always an essential of an action against a carrier of passengers; but although this is so, yet if the vehicle is at the time of the injury being done under the control of the carrier, negligence is *primâ facie* presumed from this very circumstance, and the onus of proof will lie, in the first place, on the carrier to explain and shew that there was really no negligence on his part (t).

But proof of the vehicle being under the carrier's control at the time of the accident is *primâ facie* proof of negligence.

Although a person, therefore, has always had a right of action for an injury done to him through the negligence of another, yet if the injury was so excessive as to actually cause his death, the person guilty of, or responsible for the negligence escaped from his liability to an action, upon the principle that it was an action personal to the individual, and he having died there was no one to maintain it, the right to bring it having ended with his decease, the maxim being, *Actio personalis moritur cum personâ* (u). The law upon this point has, however, been altered by an Act intitled "An Act for compensating the Families of Persons killed by Accidents," and generally known as Lord Campbell's Act (w).

Actio personalis moritur cum personâ

By that Act it is enacted: "That whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is

Provisions of Lord Campbell's Act, 9 & 10 Vict. c. 93.

(s) *Redhead v. Midland Ry. Co.*, L. R. 2 Q. B. 412; *Ibid.* 4 Q. B. 379.

(t) *Flannery v. Waterford & Limerick Ry. Co.*, 11 Ir. Reps. (C. L.) 30. As to what will be evidence of negligence, see *Slattery v. Dublin, &c., Ry. Co.* 10 Ir. Reps. (C. L.) 256, affirmed in House of Lords, Ir. Reps. 2 Q. B. D. (App.) 319.

(u) See Broom's Legal Maxims, 904.

(w) 9 & 10 Vict. c. 93; amended by 27 & 28 Vict. c. 95. The provisions of these Acts constitute the great exception to the maxim, *Actio personalis moritur cum personâ*; but see other exceptions, *ante*, pp. 260, 290.

such as would, if death had not ensued, have entitled the person injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, *and although the death shall have been caused under such circumstances as shall in law amount to a felony* " (x).

Every such action, the Act provides, shall be brought by the executor or administrator of the person deceased within twelve calendar months after the death of such deceased person (y); and shall be for the benefit of the wife, husband, parent (which term is to include father, mother, grandfather, grandmother, stepfather and stepmother), and child (which term is to include son, daughter, grandson, granddaughter, stepson and stepdaughter), of the deceased (z). Only one action is to be brought in respect of the same subject-matter of complaint (a), and the plaintiff, executor, or administrator must deliver to the defendant or his solicitor full particulars of the person or persons for the benefit of whom the action is brought, and of the nature of the claim in respect of which damages are sought to be recovered. All damages recovered, after deducting any costs not recovered from the defendant, are to be divided amongst the before-mentioned relatives in such shares as shall be found and directed by the jury (b).

Amendment of
the Act by 27
and 28 Vict. c.
95.

The provision, however, that the action must be brought by the executor or administrator has been amended by a subsequent statute (c), which provides

(x) Sect. 1. As to the words italicised in the text, the student will remember that the general rule as to a tort amounting to a felony is that the civil remedy is suspended until the felony has been punished. See *ante*, p. 250.

(y) 9 & 10 Vict. c. 93, ss. 1, 2, 3.

(z) Sects. 2, 5. The expression "child" does not include an illegitimate child. *Dickinson v. North Eastern Ry. Co.*, 33 L. J. (Ex.) 91.

(a) Sect. 3.

(b) Sect. 4.

(c) 27 & 28 Vict. c. 95, s. 1.

that if there shall be no executor or administrator of the deceased, or if the action is not brought by such executor or administrator within the first six of the twelve months allowed, then it may be brought in the name or names of all or any of the persons for whose benefit the executor or administrator would have sued.

All the general rules of law which govern ordinary actions for negligence by the person actually injured apply to this kind of action; so that, for instance, where by reason of the person's contributory negligence (*d*) he could not have himself maintained any action, neither can his representatives (*e*).

In giving damages in cases under Lord Campbell's Act the jury are limited to considering the actual pecuniary loss suffered by the persons for whose benefit the action is brought; they cannot speculate on the advantages that might have resulted to such persons had the deceased not been killed, nor can they look to the grief caused to such persons and the injury done thereby to their feelings, but they may consider the fair loss of comforts and conveniences through the decease of the head of a family (*f*).

And if the deceased has during his lifetime brought an action and recovered damages thereon for the injury done to him, or has made some arrangement with the causer or causers of the injury for compensation to him, and received satisfaction thereunder, no action can be brought under Lord Campbell's Act (*g*).

If a person travelling by rail, thinking, on the train stopping, that it has arrived at his station and that he

The damages that may be awarded in an action under these Acts.

No action can be brought if the deceased has during his lifetime received compensation.

Liability of a railway company in case of an injury arising from a train overshooting the platform.

(*d*) Contributory negligence is noticed, *post*, pp. 349–352.

(*e*) *Watling v. Oastler*, L. R. 6 Ex. 73; see judgment in *Pryor v. Great Northern Ry. Co.*, 2 B. & S. 767.

(*f*) *Franklin v. South Eastern Ry. Co.*, 3 H. & N. 211; *Pryor v. Great Northern Ry. Co.*, *supra*; Addison on Torts, 551, 552. See further hereon, *post*, part iii. ch. i. pp. 375, 376.

(*g*) *Read v. Great Eastern Ry. Co.*, L. R. 3 Q. B. 556

should therefore alight, does so, and by reason of its having overshot the platform or otherwise he is thereby injured, the company are liable, if he had fair reason for believing that it was at the station and that he might and ought to get out (*h*).

A master is not liable for an injury done to a servant by another servant acting in a common employment.

Reason of this.

It has been pointed out (*i*) that a person is fully liable for the acts of those whom the law denominates his servants, under the maxim, *Qui facit per alium facit per se*, but to this rule there is one very important exception, and it is this, viz., that if the person injured is also a servant acting in the course of a common employment with the servant guilty of the negligence, here the master is under no liability (*k*). Thus, although on a railway accident happening through the negligence of the driver of the train or some other employé of the company, the company will be liable to passengers for the injuries done to them, yet they will not be liable for injuries done to the stoker, guard, or other servant of theirs employed in the train. The reasoning upon which this exception is founded is this, that the servant in entering on his employment saw and contemplated all the risks he would or might run, and agreed to include them all in his wages, and has identified himself with the other servants acting in his common employment; so that just as where an injury to a servant has happened through his own negligence he can have no remedy against his employer, so although the injury does not happen to him but to his fellow-servant, yet it is just the same (*l*). In all such cases as this, however, it is manifestly the duty of the master to

(*h*) *Foy v. London, Brighton, and South Coast Ry. Co.*, 18 C. B. (N.S.) 225; *Cockle v. South Eastern Ry. Co.*, L. R. 5 C. P. 457; L. R. 7 C. P. (Ex. Ch.) 321; *Robson v. North Eastern Ry. Co.*, L. R. 10 Q. B. 271; L. R. 2 Q. B. Div. 85.

(*i*) *Ante*, p. 334.

(*k*) *Pricatly v. Fowler*, 3 M. & W. 1; *Winterbottom v. Wright*, 10 M. & W. 109; *Tunney v. Midland Ry. Co.*, L. R. 1 C. P. 290.

(*l*) See *Hutchinson v. York, &c., Ry. Co.*, 5 Ex. 351; *Bartonshill Coal Co. v. Reid*, 3 Macq. H. L. Cases, 266; *Lovell v. Howell*, L. R. 1 C. P. Div. 161.

provide competent fellow-servants and proper tackle and machinery for the servant to work with, and in so far as he fails in doing this, and through his not doing it the injury occurs, he will be liable as if the person had been a stranger (*m*).

The words "common employment" will have been noticed in the preceding paragraph, and from it the student must understand that if, although the persons are fellow-servants, yet they are not acting in the course of a common employment, *i.e.*, are not employed in duties of something of the like nature, the exception will not apply, and the master will still be liable (*n*).

The servants must, however, be acting in a common employment.

Nuisances existing from negligence cause injury to property even more frequently than to the person: thus the neglect to cleanse drains, sewers, &c., beyond the injury they may do to health, may also materially depreciate the value of surrounding property; the neglect to clean chimneys, or to repair ruinous houses, may do great injury to property, and many instances of a like character might be enumerated.

2. Negligence causing injury to property only.

Although there may be no obligation as between a landlord and his tenant to repair the demised premises, yet it is the duty of the landlord so to act as to protect the public at large, and if he lets the house get into such a ruinous condition that it or some part of it falls down, he is liable, not only for the injury that may be done to persons, but also for the injury done to neighbouring houses (*o*); unless, indeed, he has demised the premises to a tenant, and at the time of the demise they were not either faulty or ruinous, but have been let to

The owner of a house must do such repairs as to prevent it causing an injury through its ruinous state.

(*m*) Ibid; *Wilson v. Merry*, L. R. 1 Scotch App. 326; *Roberts v. Smith*, 26 L. J. (Ex.) 319; *Senior v. Ward*, 28 L. J. (Q.B.) 139. Legislation may however be expected on this subject shortly.

(*n*) *Smith v. Steele*, L. R. 10 Q. B. 125; and see *Wilson v. Merry*, *supra*; *Lovell v. Howell*, L. R. 1 C. P. Div. 161; *Conway v. Belfast Ry. Co.*, 11 Ir. Reps. (C. L.), 345.

(*o*) *Todd v. Flight*, 30 L. J. (C.P.) 31.

become so by the tenant on whom the obligation to repair rested during the continuance of the original demise (*p*). Where, however, there is no direct obligation on the landlord as between himself and his tenant to repair, although he is liable, as above stated, to injury to third persons' property, yet he is not liable if the premises by their ruinous state injure any part of his tenant's property; provided, of course, that the premises have become ruinous since the tenancy, and were not in that state when the tenant entered (*q*).

Right to the support of adjoining land or buildings.

Every man has a right to the lateral support of his neighbour's land to sustain his own unweighted by buildings, and if buildings have been notoriously supported by neighbouring land for a period of twenty years, then a privilege is gained in the nature of a prescriptive right, and quite irrespective of any negligence the owner of the supporting land will be liable if he so deals with his own land as to deprive the buildings of their support, and cause them to fall, or be otherwise injured (*r*). In the case, however, of twenty years not having so elapsed, then there can be no such extensive right to the support of the neighbouring land, and the owner thereof cannot be compelled to leave sufficient land to support the buildings; but although this is so, yet it is clearly his duty in dealing with his land to act very carefully, and to give the owner of the buildings notice of his intention, so that the latter may have an opportunity of shoring up his buildings, or doing other acts for their protection, and in so far as he fails in acting carefully, and giving such warning, he will be liable for negligence (*s*).

Rights when a house is let to different persons.

Where different floors of a house are let to different persons, each must so act as not to injure the other,

(*p*) *Robbins v. Jones*, 33 L. J. (C.P.) 1; *Chauntler v. Robinson*, 4 Ex. 163.

(*q*) *Gott v. Gandy*, 23 L. J. (Q.B.) 1.

(*r*) Addison on Torts, 395; *ante*, p. 263.

(*s*) *Dodd v. Holme*, 1 A. & E. 506; *Jones v. Bird*, 5 B. & Ald. 837; and see 18 & 19 Vict. c. 122, s. 94.

and if one places more weight in his rooms than the floor can bear, and it accordingly give way, and does injury to property of a person below, he is liable (*t*).

If a person on whom any obligation rests to keep up a fence or wall, negligently allows it to become defective, he is liable to any injury happening, *e.g.*, by cattle straying from the lands and getting killed. There is not, generally speaking, any obligation on a person to fence out his neighbour's cattle for his neighbour's protection, but railway companies are under this obligation as to land adjoining the railway (*u*). And although a person or a railway company may be under an obligation to keep up a fence or a wall, and therefore liable to injuries to cattle straying through the negligent state of the fence or wall, yet such liability does not extend to cattle not properly on the land, but trespassing thereon (*v*).

Liability arising from allowing fences to become defective.

Although, if a collision occurs in the public streets, it is clearly the duty of the owner of an overturned vehicle to take steps to remove the obstruction, and he will be liable if he negligently allows it to remain there, yet the same rule does not apply to ships. If a vessel through a collision, or otherwise, *without any fault or negligence on the part of the person having control of it*, sinks, there is no duty or obligation thrown upon the owner to take steps to prevent its being an obstruction to the navigation of other vessels, but he may abandon it and leave it there (*x*). If, however, the vessel is not abandoned, but the owner exercises acts of control over it, *e.g.*, by attempting to raise it, or by sending divers down, or otherwise endeavouring to get up part of the cargo, then this principle does not apply, for a vessel may just as much be in a man's

If a collision occurs in the public streets, the owner must remove the obstruction; but this is not so in the case of collisions at sea, if the obstructing vessel is abandoned.

(*t*) Addison on Torts, 400, 401.

(*u*) *Ante*, pp. 260, 261, and note (*d*); 8 & 9 Vict. c. 20, s. 68.

(*v*) *Manchester, &c., Ry. Co. v. Wallis*, 23 L. J. (C.P.) 85.

(*x*) *Brown v. Mallett*, 5 C. B. 599.

control under water as above water, and in this case it is his duty to act with all due care and prudence in just the same way as it was his duty when the ship was afloat to act with all due care and prudence in navigating—thus, if he is exercising acts of control or ownership, he must take steps to mark out the place where the ship has sunk, so that it may be avoided, and if he fails in doing this, he is guilty of negligence, and liable accordingly (y).

Liability in respect of injuries done through negligent or accidental fires.

In the case of a fire happening on one person's premises, and extending and doing injury to his neighbour's, generally speaking the person on whose premises the fire originated was liable in respect of the damage done. It has, however, now been provided that no action shall be maintained against any person on whose premises a fire shall accidentally originate (z). The law, therefore, now is, that if a fire happens through either any wilful act, or any negligent conduct of a person or his servants, he is liable; but if the fire really happens through pure accident, and cannot be traced to any cause, then the person on whose premises the fire originated is not rendered liable by the mere fact that it originated on his premises (a).

A railway company not liable for an injury arising from sparks from an engine if there has been no negligence.

A railway company, authorized by the legislature to use locomotive engines, is not responsible for damage from fire occasioned by sparks emitted from an engine travelling on the railway, provided the company has taken every precaution in its power, and adopted every means which science can suggest, to prevent injury from fire, and is not guilty of negligence in the management of the engine (b). No action will lie against a railway

Nor for injury from vibration or smoke.

(y) *Manley v. St. Helen's Canal and Ry. Co.*, 2 H. & N. 840; see judgment delivered by Mr. Justice Maule in *Brown v. Mallett*, *supra*.

(z) 14 Geo. 3, c. 78, s. 86.

(a) Addison on Torts, 339–341.

(b) *Vaughan v. Taff Vale Ry. Co.*, 5 H. & N. 679; 29 L. J. (Ex.) 247; Addison on Torts, 341, 342.

company by the owner of a house, none of whose property has been taken by the company, for compensation in respect of injury done to the house by vibration or smoke (c).

Waste, of that kind called permissive waste, constitutes an injury to property peculiarly arising from negligence. The subject of waste (which pertains more particularly to real property) has been already noticed as far as the scope of the present work permits (d). Waste.

A sheriff is liable for the negligent acts of all his officers acting in the execution of their office, and therefore if an officer, having arrested a debtor, afterwards negligently permits him to escape, or if he neglects to arrest him in the first instance when he ought to have done so, or having a writ of *fi. fa.* neglects to levy when he should have done so, or having levied is guilty of any negligence afterwards in realizing the goods, whereby the judgment creditor is injured, in all these cases an action lies against the sheriff for the negligence. It is the duty of the officer, on a warrant being delivered to him, to make all inquiries as to the whereabouts of the debtor or of his goods, and there is no obligation on the plaintiff or his solicitor to furnish him with information and assistance in the execution of the writ (e). Negligence by sheriff's officers.

The Bankruptcy Act, 1869 (f), provides that execution for 50*l.* and upwards, levied by seizure and sale on the property of a *trader*, shall be an act of bankruptcy, and that in any such case the sheriff shall retain the proceeds of the sale in his hands for fourteen days; and if a petition for adjudication or liquidation by arrangement is presented within that time, shall pay Duty of sheriff under the Bankruptcy Act, 1869.

(c) *Hammersmith and City Ry. Co. v. Brand*, L. R. 4 Eng. & Ir. App. 171; 18 W. R. 12.

(d) *Ante*, pp. 268–271.

(e) Addison on Torts, 645, 646. See, as to the measure of damages in actions against sheriffs, *post*, part iii. ch. i. pp. 378, 379.

(f) 32 & 33 Vict. c. 71, ss. 6 and 87.

them over to the trustee to be applied in the bankruptcy or liquidation. If, then, the sheriff neglects to so retain the proceeds in such a case for the above period, and a bankruptcy or liquidation does occur, this will be negligence in respect of which an action will lie by the trustee.

Negligence by railway company by reason of the non-arrival of a train at the proper time.

If a railway company advertises a certain train to arrive or depart at a specified time, and through their negligence considerable delay occurs, whereby a person is put to expense or otherwise damnified, he may recover from the company; even although one of the company's conditions is to the effect that the company will not guarantee the punctuality of the trains; and under particular circumstances, but not as a matter of course, a person is justified in taking a special train and charging the expense thereof to the company (*g*).

3. Defences to an action for negligence.

3. In addition to the self-evident defence of a simple denial of the negligence alleged, in which the matter resolves itself into a question for the jury of yes or no, there may be two other defences of a rather more complex nature, viz., 1. That the alleged negligence was really and substantially an inevitable accident; and, 2. That there was contributory negligence on the part of the person complaining of the negligence. As to the first of these two defences, that of inevitable accident, this might be put down under the head of a simple denial of the negligence, for of course if it is an inevitable accident there is no negligence; but a few words are necessary to point out what is such an accident, one or two instances of it, and the distinction between it and an act really amounting to negligence.

What will be an inevitable accident.

An inevitable accident that will form a defence to an action for negligence may be described as some act quite undesigned and unforeseen, and in respect of

(*g*) *Hamlin v. Great Northern Ry. Co.*, 1 H. & N. 408; *Le Blanche v. London and North Western Ry. Co.*, L. R. 1 C. P. D. 286; 45 L. J. (App. C.P.) 521.

which the person committing it has not been guilty of the slightest particle of negligence (*h*). Thus, for instance, a railway accident generally happens through some negligence on the part of the railway company, but, as has been pointed out, an accident may arise in which the ingredient of negligence may be totally wanting, as by lights being obscured by fog or snow, or by there being some latent defect in a wheel or in machinery that no care or foresight could have discovered (*i*). In such cases as this, then, we have instances of an inevitable accident that will form a perfect defence to any action for negligence.

But although an act may apparently result from inevitable accident, yet on close examination some negligence may often be discovered. Thus, if A. puts a gun belonging to him away in a proper and ordinarily secure place, and in some utterly unforeseen way a child gets possession of it and shoots some one, this will be an inevitable accident, and there will be no liability on A.'s part; but if A. has left his gun in a place he should not have done, and it is there got possession of and an injury done, here this is not an inevitable accident, for there is original negligence on A.'s part in leaving it there (*j*).

Contributory negligence may be defined as such an act of negligence on the part of a person complaining of the negligence of another, as in reality is the proximate cause of the injury complained of, and but for which such injury would not have happened; *e.g.*, if a person negligently walks upon a railway and a train

Definition of contributory negligence.

Instance of contributory negligence.

(*h*) *Wakeman v. Robinson*, 1 Bing. 213; *Kearney v. London, Brighton, and South Coast Ry. Co.*, L. R. 5 Q. B. 411. See Brown's Law Dict. 6, tit. "Accident." Of course the "accident" above spoken of is quite distinct from accident in equity, in which the Court gives relief in a limited class of cases against the consequences of an act which has actually occurred; as to which see Snell's Principles of Equity, 420 *et seq.*

(*i*) *Ante*, pp. 338, 339.

(*j*) See *ante*, p. 336.

kills or injures him, here neither he nor his representatives in the case of his death have any remedy, for the injured person's own negligent act has been the proximate cause of the injury.

It is not every mere act of negligence on the plaintiff's part that will preclude him from recovering.

But as to what will constitute contributory negligence so as to preclude a plaintiff from recovering in his action, it is not every mere act of negligence on his part that will suffice; for, in the words of our definition, the act must be such a one "as in reality is the proximate cause of the injury complained of, and but for which such injury would not have happened." The mere fact of there having been negligence on the plaintiff's part does not justify the defendant in having acted anyhow, and if, notwithstanding such negligence, the defendant yet might with reasonable care have avoided doing the injury, then he has been in reality the proximate cause of the injury, and is liable accordingly, notwithstanding the negligence on the plaintiff's part (*k*). Thus, to take the instance given above of contributory negligence by walking on a railway, if the driver of the train chose to start it although he saw the person walking there, here, as he might with due care have prevented the accident, the company would generally be liable.

A person taking a manifestly dangerous course cannot recover from the person causing the danger.

If a person sees that a way he is taking has been rendered manifestly dangerous by the negligence of another, as, for instance, if he is driving and some obstruction has been left in the road, and he yet chooses to risk the danger, and in doing so is injured, this constitutes contributory negligence on his part, so as to prevent his recovering (*l*).

(*k*) *Davies v. Mann*, 10 M. & W. 546 (which forms a particularly good instance of this principle); *Tuff v. Warman*, 2 C. B. (N.S.) 740; *Ibid.* 5 C. B. (N.S.) 573; *Mayor of Colchester v. Brooke*, L. R. 7 Q. B. 339.

(*l*) *Clayards v. Dethick*, 12 Q. R. 439; *Thompson v. North Eastern Ry. Co.*, 31 L. J. (Q.B.) 194.

The doctrine of contributory negligence applies equally to a person not competent of taking care of himself—*e.g.*, a young child—as to an ordinary person, for though he himself may not have the capacity to be guilty of what can be styled negligence, yet he is identified with the person whose duty it was to have taken care of him, and who has accordingly been guilty of negligence (*m*).

The doctrine of contributory negligence applies to children, &c.

And in the same way that a master is liable for the negligence of his servant, under the maxim, *Qui facit per alium facit per se* (*n*), so the contributory negligence of the servant will be the contributory negligence of the master, and prevent him from recovering (*o*). There are some cases which go to shew that this principle applies to the case of an injury happening to a person being conveyed in some vehicle—*e.g.*, a train or stage-coach—and that such person is so identified with the driver of the vehicle, that if the injury to him has occurred through the contributory negligence of such driver, it is the same as if it had been his (the passenger's) negligence, and that therefore he cannot recover (*p*); but it must at any rate be considered as rather doubtful whether this is really the law (*q*).

The contributory negligence of a servant will be the contributory negligence of his master.

The doctrine of contributory negligence does not apply to ships, as to which the rule of the Admiralty Court has always been that if both vessels are in fault (*r*), the damage done is to be divided between them (*s*), and the Judicature Act, 1873, although

The doctrine of contributory negligence does not apply to ships.

(*m*) *Singleton v. Eastern Counties Ry. Co.*, 7 C. B. (N.S.) 287; *Abbot v. Macfie*, 33 L. J. (Ex.) 177; *Mangan v. Atterton*, L. R. 1 Ex. 239.

(*n*) *Ante*, p. 334.

(*o*) *Child v. Hearn*, L. R. 9 Ex. 176; *Armstrong v. Lancashire, &c., Ry. Co.*, L. R. 10 Ex. 47.

(*p*) *Thorogood v. Bryan*, 8 C. B. 115; *Bridges v. North London Ry. Co.*, L. R. 6 Q. B. 377.

(*q*) See *The Milan*, 31 L. J. Adm. 105; and see the cases quoted in the note to *Ashby v. White*, 1 S. L. C. 315, 316, and the reasoning upon the subject there. See also Addison on Torts, 26, 27.

(*r*) As to when a vessel will be deemed in fault, see 17 & 18 Vict. c. 104, ss. 295, *et seq.*, and 25 & 26 Vict. c. 63, s. 25.

(*s*) See Addison on Torts, 574.

uniting the former courts into one, expressly provides that in this respect the Admiralty rule shall still prevail (*t*). This rule of the Admiralty Court is, however, to a certain limited extent superseded by the provisions of the Merchant Shipping Act, 1873 (*u*), which enacts (*x*) that if in any case of collision it is proved to the Court before whom the cause is tried that any of the regulations for preventing collision contained in or made under the Merchant Shipping Acts, 1854 to 1873, have been infringed, the ship by which any such regulation has been infringed, shall be decreed to be in fault unless it is shewn to the satisfaction of the Court that the circumstances of the case made departure from the regulation necessary.

The doctrine of contributory negligence is founded on the maxim, *Volenti non fit injuria*. The doctrine of contributory negligence seems to be founded and to proceed upon the maxim, *Volenti non fit injuria* (*y*).

(*t*) 36 & 37 Vict. c. 66, s. 25 (*y*).

(*u*) 36 & 37 Vict. c. 85.

(*x*) Sect. 17.

(*y*) Broom's Coms. 677.

PART III.

OF CERTAIN MISCELLANEOUS MATTERS NOT BEFORE TREATED OF.

CHAPTER I.

OF DAMAGES.

THE subject of Damages has in the preceding pages been now and then casually mentioned, and in the present chapter it is proposed to give it such special notice as the scope of the present work admits of. We will consider the subject in the following order: Mode of considering the subject.

1. Damages generally.
2. The measure of damages generally.
3. Damages in some particular cases.

1. The main object of an action is generally to recover compensation for the injury complained of, that is to say, compensation in respect of some alleged breach of contract or for some alleged tort, and this compensation is called damages. Damages, therefore, have been rightly defined as a pecuniary compensation, recoverable by action, for breach of contract or in respect of a tort (z). 1. Damages generally.

Definition of the term damages.

Damages may be either liquidated or unliquidated. By liquidated damages is meant compensation of a fixed amount agreed and decided on between the parties; by unliquidated damages is meant compensation not so agreed and decided upon, but remaining yet to be ascer- Difference between liquidated and unliquidated damages.

(z) Brown's Law Dict. 108.

tained by the means pointed out by law, *i.e.*, ordinarily by a jury. Thus if one person buys goods of another, and agrees to pay a certain price for them, which he neglects to do, this is a case of liquidated damages, for the parties have agreed on the amount to be paid, which is fixed and certain; but if in such a case the person agreeing to supply the goods neglects to do so, the buyer here has a claim for damages of an unliquidated nature, to be estimated and ascertained by the proper tribunal according to the rule or measure of the damages suffered; and so also it is the same in all actions of tort, such as libel, slander, and the like, here the person has a claim for unliquidated damages.

Persons may agree what shall be the damages.

But the Court will look to see whether the sum agreed to be paid is really liquidated damages, or by way of penalty, and if the latter will not enforce it.

The Court, in doing this, looks to the true intent of the parties.

But in the case above mentioned of breach of a contract to supply goods the parties may and sometimes do at the time of entering into the contract consider the possibility of a breach happening, and provide what shall be the compensation or amount of damages to be paid to the injured party. If this is done, and there is an agreement on breach to pay a certain sum actually by way of agreed and liquidated damages, then that amount is recoverable (a). In any such case as this, however, the Court looks at the contract with great care, and the mere fact that the parties have stipulated that on breach a certain sum shall be paid by way of compensation by the one to the other, will not always entitle that other to recover the exact amount, and this even although the parties may expressly stipulate that the amount agreed to be paid shall be by way of liquidated damages, for in many such cases the sum agreed to be paid may really be a penal sum, and if it is so, then the Court will not enforce it, but will relieve against it (b). The Court, in doing this, does not at all interfere with the powers that persons naturally must have

(a) *Price v. Green*, 16 M. & W. 346; *Hinton v. Sparks*, L. R. 3 C. P. 161; 37 L. J. (C.P.) 8.

(b) *Kemble v. Farren*, 6 Bing. 141.

of estimating their own damages, but what it does is to look to the real and true intention of the parties (c), not being bound down by the mere words used by them, but looking at the whole instrument to arrive at the true construction. Thus in the case already quoted of *Kemble v. Farren* (d) the defendant had engaged with the plaintiff to perform as a comedian at the plaintiff's theatre for a fixed time at a certain remuneration, and it was mutually agreed that if either of the parties should neglect or refuse to fulfil the agreement, or any part of it, such party should pay to the other the sum of £1000, which was thereby declared between the parties to be liquidated and ascertained damages, and not a penalty or penal sum or in the nature thereof. Yet the Court held that the stipulated sum of £1000 was in the nature of a penalty, and therefore not recoverable, but unliquidated damages only were recoverable. It was indeed but a penalty in the disguise of liquidated damages, for it was to be paid on breach equally by either party, and it was evident that had the breach been by the plaintiff the true damage sustained by the defendant would have been the fixed remuneration he was to be paid during the time agreed upon, and not such a sum as this. Had this sum been stipulated to be paid only on breach by the defendant, then, as his breaches were of an uncertain nature and amount, the stipulation would no doubt have been construed as liquidated damages and good, for the rule has been laid down that where the damage is *entirely uncertain*, and the parties agree on a definite sum by way of liquidated damages, then that sum will be so construed and will be recoverable (e).

*Kemble v.
Farren.*

Where a sum is expressed in an agreement to be a penalty, it will always be so considered, and the

Effect of specifying that a sum agreed to be paid is by way of penalty.

(c) Per Keating, J., in *Lea v. Whitaker*, L. R. 8 C. P. 73.

(d) *Kemble v. Farren*, 6 Bing. 141, ante, p. 354.

(e) Per Coleridge, J., *Reynolds v. Bridge*, 6 E. & B. 541; *Mercer v. Irving*, 27 L. J. (Q.B.) 291.

action must be brought on breach for unliquidated damages, and not for the fixed amount (*f*); it has, however, been held that where the real damages would be excessively difficult to arrive at, a sum stipulated to be paid, although mentioned as a penalty, may be recovered as liquidated damages (*g*).

A person in suing for unliquidated damages is not restricted to the amount of a named penalty.

Where a sum is really a penalty but there is a breach of contract, and the plaintiff instead of suing for the penalty sues on the contract, he is not restricted in the amount that he may recover to the sum named as the penalty, but may recover a sum exceeding it (*h*).

“Where it is doubtful from the terms of the contract whether the parties meant that the sum should be a penalty or liquidated damages, the inclination of the Court will be to view it as a penalty. But the mere largeness of the amount fixed will not *per se* be sufficient reason for holding it to be so” (*i*). It is for the Court to decide upon a consideration of the whole instrument whether a sum stipulated to be paid is a penalty or liquidated damages, and the principle to guide the Court is the real intention of the parties to be ascertained from the language they have used (*k*).

Difference in procedure where damages liquidated and unliquidated respectively.

Besides the difference between liquidated and unliquidated damages in their very nature (*l*), there is a difference in the course of procedure. In the case of liquidated damages the plaintiff may issue a writ specially indorsed, on which, if the defendant does not appear within the eight days limited, he may forthwith sign final judgment and issue execution against the defendant, or proceed to obtain satisfaction of his judgment in any other way that he can; but in the case of

(*f*) *Smith v. Dickenson*, 3 B. & P. 630.

(*g*) *Sainter v. Ferguson*, 7 C. B. 716.

(*h*) *Mayne on Damages*, 124.

(*i*) *Ibid.* 131.

(*k*) *Ibid.* 125.

(*l*) *Ante*, pp. 353, 354.

unliquidated damages, the writ cannot be specially indorsed, and on the defendant's non-appearance within the time aforesaid, the plaintiff can only sign interlocutory and *not* final judgment, after which he has to proceed to assess his damages by writ of inquiry, or reference to a master or assessors, as the case may be, and it is only after this that he obtains final judgment (*m*).

Wherever there has been actually what the law considers an injury committed, the party suffering it must always be entitled to maintain an action, for every injury imports a damage, although it does not really cost the party anything (*n*), although of course some injuries may entitle a person to a very different amount of damages to what others would. In some cases clearly the party complaining may have sustained no substantial damage, *e.g.*, in the case of the breach of a contract to buy goods where the price of the goods has afterwards gone up, for here there has been no loss to the vendor, and it will be the duty of the judge to direct the jury to award only nominal damages (*o*). In other cases proof may be given of an injury possibly causing some damage not necessarily nominal, but which cannot be estimated except by ordinary opinion and judgment, *e.g.*, in an action against a banker for not honouring his customer's cheque (*p*). In other cases there are what are called special damages, that is, substantial and real damage, reasonably or probably caused by the act of the defendant (*q*). In our second division of the subject of damages, the general rule to be followed by the jury in assessing these special damages will be noticed (*r*).

Wherever there has been what the law considers as an injury, there must be a right of action for it.

Differences between nominal, general, and special damages.

(*m*) See Judicature Act, 1875, Order XIII. rr. 3, 4, 6. See also Indermaur's Manual of Practice, 39, 41.

(*n*) See *Ashby v. White*, 1 S. L. C. 264; Lord Raymond, 938.

(*o*) See *Marzetti v. Williams*, 1 B. & A. 415; Broom's Coms. 610; Mayne on Damages, 5.

(*p*) See as to these, per Cresswell, J., *Rolin v. Steward*, 14 C. B. 605; *Larios v. Gurety*, L. R. 5 Priv. C. 346; Broom's Coms. 610.

(*q*) Broom's Coms. 610.

(*r*) *Post*, pp. 363-370.

Cases in which a person may lose his right to damages or a portion thereof.

There are two cases in which, although a person may, primarily speaking, be entitled to damages, yet he may lose his right to them, or at any rate his right to a considerable portion of them. The first of such cases is where the defendant shews some fact in mitigation of the damages, *e.g.*, in an action brought for the price of some article which has been warranted by the plaintiff, the defendant can give in evidence the breach of the warranty in reduction of the damages, or to the extent even of shewing that the plaintiff is entitled to recover nothing (*s*), or, as has been shewn (*t*), in an action for libel, the defendant may mitigate the damages by shewing that an apology has been given or offered. The other of such cases is that of set-off, that is, where the defendant has some counter-claim against the plaintiff, and upon this point the student will bear in mind the very important provision contained in the Judicature Act, 1875 (*u*).

A person who has recovered damages once, cannot bring another action in respect of the same act.

Where a person has suffered injury from the tortious act of another, and has brought an action and recovered damages for it, he cannot, on further damage resulting to him from the act, bring another action, for it is all presumed to have been contemplated in the original action. Thus, if A. has met with a railway accident, and recovered damages for it, and afterwards the injury turns out more serious, still he can have no fresh action (*x*).

The jury cannot award more damages than the plaintiff claims.

The plaintiff, in his statement of claim, has to set forth the amount of the damages which he claims, and the jury, in awarding the damages, must take such amount as their maximum, and cannot go beyond it, unless the Court allows the claim to be amended (*y*).

(*s*) See *ante*, p. 86.

(*t*) *Ante*, p. 319.

(*u*) 38 & 39 Vict. c. 77; Order XIX. r. 3; *ante*, pp. 216, 217. As to set-off generally see Mayne on Damages, 100-121.

(*x*) Per Best, C.J., *Richardson v. Mellish*, 2 Bing. 240.

(*y*) Mayne on Damages, 122, 499.

Although the jury have a discretion in awarding the amount of the damages, such discretion is not quite absolute, for if they give damages which are manifestly either grossly excessive in comparison with the injury sustained by the plaintiff, or utterly inadequate to it, the Court may award a new trial (z).

Though the question of damages is for the jury, a new trial may sometimes be granted.

This power of the Court, however, to grant a new trial on the point of inadequacy or excess of the damages, is very carefully exercised. For the Court to grant a new trial on the ground of excess, the damages must be shewn to be so clearly too large that the jury, in awarding them, must have acted under some wrong motives or some misconception or mistake; if it is simply a case of uncertain damage, the mere fact that the Court, to whom the application is made, would have awarded a less amount, is not sufficient to entitle the person to a new trial (a). In the case of smallness of damages also the Court will rarely interfere, unless some misconduct or accident, error or mistake on the part of the jury is shewn (b). And in applications for a new trial on either of these grounds, it is not customary to grant it unless the judge before whom the action was tried expresses himself dissatisfied with the damages awarded.

It has been stated that the main object of an action is generally to recover compensation for the injury complained of (c), but this is not invariably so—for instance, an action may be brought for an injunction against the commission or continuance of some act by the defendant, such as waste, and although damage may be claimed for the injury already done, yet sometimes

An action, though it usually is, need not necessarily be for damages.

(z) As to new trials see Mayne on Damages, 510-518; Indermaur's Manual of Practice, 80, 81.

(a) See *Chambers v. Caulfield*, 6 East, 256.

(b) *Rendall v. Hayward*, 5 Bing. N. C. 424; *Richards v. Rose*, 23 L. J. (Ex.) 3.

(c) *Ante*, p. 353.

the injunction is what is particularly desired (*d*). Two cases, in which the action need not mainly be for damages, may specially be mentioned.

Provision of
the Common
Law Procedure
Act, 1854,
s. 78.

It is provided by the Common Law Procedure Act, 1854 (*e*), that in any action in respect of the wrongful detention of goods or chattels the plaintiff may apply to the Court or a judge on a verdict being given for him, to order execution to issue for the return of the particular goods, without giving the defendant the option of retaining them on paying their value, and the Court may, at discretion, so order (*f*). Prior to this Act, the judgment was always for the return of the goods themselves, *or* for payment of damages for their value, the defendant having the option of which he would do.

Provision of
the 19 & 20
Vict. c. 97,
s. 2.

Where a person has contracted to buy goods or chattels, formerly his only remedy for non-delivery was an action for damages for the breach of the contract, but now, under the provisions of the Mercantile Law Amendment Act, 1856 (*g*), he may, in some cases, obtain the specific delivery of the goods or chattels contracted for. That Act provides (*h*), that in all actions and suits in any of the superior courts for breach of contract to deliver specific goods for a price in money, *on the application of the plaintiff*, and by leave of the judge before whom the cause is tried, the jury shall, if they find the plaintiff entitled to recover, find by their verdict what are the goods in respect of the non-delivery of which the plaintiff is entitled to recover, and which remain undelivered; what (if any) is the sum the plaintiff would have been liable to pay for the delivery thereof; what damages (if any) the plaintiff would have sustained if the goods should be delivered under execu-

(*d*) An injunction may be granted by any division of the High Court of Justice.

(*e*) 17 & 18 Vict. c. 125, s. 78.

(*f*) See also *ante*, p. 289.

(*g*) 19 & 20 Vict. c. 97

(*h*) Sect. 2.

tion as thereafter mentioned, and what damages if not so delivered ; and thereupon, if judgment shall be given for the plaintiff, the Court or any judge thereof, at their or his discretion, on the application of the plaintiff, shall have power *to order execution to issue for the delivery* on payment of such sum (if any) as shall have been found to be payable by the plaintiff, as aforesaid, of the said goods, without giving the defendant the option of retaining the same upon paying the damages assessed ; and such writ of execution may be for the delivery of such goods. If such goods so ordered to be delivered, or any part thereof, cannot be found, or unless the Court or a judge shall otherwise order, the sheriff or other officer of the Court is to distrain on the defendant's lands and chattels within the jurisdiction of the Court, until the defendant delivers the goods, or, *at the option of the plaintiff*, cause to be made of the defendant's goods the assessed value or damages. And the plaintiff, in addition to the specific delivery of the goods as aforesaid, is to be entitled to have made from the defendant's goods the damages, costs, and interest in such action (i).

Where damages are awarded by a jury against several defendants, it is in the option of the plaintiff to levy the whole against any one of them. If the action is on contract, however, that one has a right to a propor- Where damages recovered as against several, the whole can be levied against one.

(i) See this also, *ante*, p. 289. Prior to the Acts mentioned in the above two paragraphs (17 & 18 Vict. c. 125, and 19 & 20 Vict. c. 97), courts of law had no power of giving specific delivery of chattels. But the Court of Chancery had long had a power of giving specific delivery of chattels wrongfully detained, but only when the chattel was of some special and peculiar value for which damages would not compensate: see *Pusey v. Pusey*, and *Duke of Somerset v. Cookson*, 1 White and Tudor's Leading Cases in Equity, 820, 821, and notes. It will be observed that the powers given by the two Acts just mentioned to the courts of law were quite irrespective of any special or peculiar value in the chattel. There was one respect also in which the remedy in Chancery, when it could be taken, was more beneficial, viz., that that court could enforce its decree by attachment, while the judgment at law could only be enforced by distringas. Under the Judicature Act, 1873, it would appear that any division of the Court can give specific delivery of chattels either under these Acts or on the principle of special and peculiar value formerly acted on by the Court of Chancery.

tionate contribution from his co-defendants, but if in respect of a tort he has no such right (*k*).

Liability of an executor in an action.

A person against whom damages are awarded is, of course, liable to have the judgment fully enforced against him by execution, but in the case of an executor defendant, although he is personally liable for the costs, yet he is not for the damages, but only his testator's estate, unless he has set up some defence he knew to be false, when on default of the testator's estate he will be personally liable. He will, however, be personally liable to the fullest extent when he has in writing, for consideration, agreed to pay his testator's debt (*l*), or where he is sued on some contract he has himself entered into, *e.g.*, where he personally gave instructions for the funeral, he will be personally liable. If an executor plaintiff sues and fails, he will be liable for costs in the same way as an ordinary plaintiff, unless the Court otherwise orders (*m*).

Damages are usually assessed by a jury, but not always.

Damages are, generally speaking, assessed by a jury, but when they are really and substantially a matter of calculation,—*e.g.*, all cases of complicated accounts between the parties that cannot be conveniently disposed of by a jury in the ordinary way,—it has long been the practice to refer them for assessment to one of the masters of the court (*n*). And also under the present practice, damages may be assessed in any way in which any question arising in an action may be tried (*o*), *i. e.*, either before a judge or judges alone, or before a judge with assessors, or before a judge and jury, or before an official or special referee, sitting with or without assessors (*p*).

(*k*) *Merryweather v. Nizan*, 2 S. L. C. 546; 8 T. R. 186.

(*l*) *Ante*, pp. 39, 40.

(*m*) 3 & 4 Wm. 4 c. 42, s. 31.

(*n*) 15 & 16 Vict. c. 76, s. 94.

(*o*) Judicature Act, 1875, Order XIII. r. 6, and Order XXIX. r. 4.

(*p*) Judicature Act, 1875, Order XXXVI. r. 2; Indermaur's Manual of Practice, 70.

2. Juries in assessing special damages are bound by certain established and recognised rules, which are pointed out to them by the judge in summing up the case, which rules constitute the scale, or, measure of damages in an action (*q*). Some of these rules equally apply whether the action is founded upon contract or upon tort, and some particularly to each class of action.

2. The measure of damages generally.

The first and most important rule which applies to all actions is that the damages must not be too remote, but must be the natural and probable result of the defendant's wrongful act (*r*). "Damage is said to be too remote when, although rising out of the cause of action, it does not so immediately and necessarily flow from it as that the offending party can be made responsible for it" (*s*).

The great rule is that damages must not be too remote.

One or two illustrations will explain what is meant by this rule, and, firstly, as an instance of its application in an action of contract, we may take the important case of *Hadley v. Baxendale* (*t*) (which it has been said was a case intended to settle the law upon the subject (*u*)). In that case the facts were shortly as follows: The plaintiffs were mill-owners, and one of the mill shafts being broken, they sent a servant to the office of the defendants, who were carriers, who informed the clerk at their office that the shaft must be sent at once, the mill being stopped for want of it, and the clerk told him in reply that if it were sent any day before 12 o'clock it would be delivered the following day. Accordingly the shaft was entrusted to the defendants to carry, and the carriage paid, but through the defendants' neglect it

What is meant by this.

Hadley v. Baxendale.

(*q*) Broom's Coms. 610.

(*r*) See per Patteson, J., in *Kelly v. Partington*, 5 B. & A. 645.

(*s*) Mayne on Damages, 39.

(*t*) 9 Ex. 341.

(*u*) Per Pollock, C.B., *Wilson v. Newport Dock Co.*, L. R. 1 Ex. 189.

was not delivered in the proper time, and the making of a new shaft was through this delayed for several days. The plaintiffs contended that in estimating the damages the loss of profits caused by the stoppage of the mill should be considered, but the Court decided that they could not be taken into account, for it did not appear that the carrier had been made aware that a loss of profits would result from the delay on his part, and that the rule is that the damages in respect of breach of contract must be such as may fairly and reasonably be considered, either arising naturally from the breach, or such as may reasonably have been supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it; here the mere fact of what the servant had told the clerk, in the absence of any express or implied contract on his part that special diligence should be taken on that account, was not sufficient to make this loss of profits damages that might reasonably be expected to flow from the breach. With regard to this case it should however be mentioned that it does not necessarily follow, even had the person who delivered the shaft then informed the carrier that loss of profits would ensue from any delay, that he would thereby have been liable in respect of such loss of profits. The rule that damages must not be too remote is indeed in cases of this kind most difficult of application, and it is very hard, if not impossible, to reconcile all the decisions in which the fact of notice, or knowledge of some special circumstances, has been held sufficient to render damages arising from it recoverable as not being too remote, and different rules have been laid down upon this point: thus in one case "The damages are to be what would be the natural consequences of a breach under circumstances which both parties were aware of" (x), but this rule would

Difficulty of application of the rule as to remoteness of damages.

(x) Per Blackburn, J., in *Cory v. Thames Ironworks Co.*, L. R. 3 Q. B. 186.

appear too wide viewed by the side of the following one :
 “The knowledge must be brought home to the party sought to be charged under such circumstances, that he must know that the person he contracts with reasonably believes that he accepts the contract with the special conditions” (y).

The correct rule appears to be that where there are any special circumstances connected with a contract which may cause special damage to follow if it is broken, mere notice of such special circumstances given to one party will not render him liable for the special damage unless it can be inferred from the whole transaction that he consented to become liable for such special damage, and that if the person has an option to refuse to enter into the contract but still enters into it, this will be evidence that he accepted the additional risk in case of breach (z).

The case of *Kelly v. Partington* (a) furnishes an illustration of the rule against remoteness of damages arising in an action of tort. That was an action by a servant for slander, the words not being actionable in themselves, and the plaintiff sought to prove as damages the fact that in consequence of the slander, a third person had refused to employ her, which he otherwise would have done; but the Court held that as the words used would not naturally lead to such a result such damages were too remote.

No damages can be awarded in respect of any act of the defendant's done before the plaintiff's particular cause of action arose (b), but damages arising subsequently

Damages arising prior to the cause of action cannot be recovered; but damages arising since sometimes may.

(y) Per Willes, J., in *British Columbia Saw Mill Co. v. Nettleship*, L. R. 4 C. P. 509.

(z) Mayne on Damages, 32, 33, and see the case of *Hadley v. Baxendale* and subsequent cases on the subject collected and dealt with in Mayne on Damages, 8-34.

(a) 5 B. & A. 645; see, however, *Miller v. David*, L. R. 9 C. P. 126.

(b) Mayne on Damages, 84.

to the cause of action may be awarded where they appear to be the natural and necessary result of the act complained of, and do not in themselves constitute some new cause of action (c).

In actions on contract the motives of the defendant cannot affect the damages, except in the one case of breach of promise of marriage.

In actions on contract the measure of damages never depends upon the motives which led the defendant to break the contract, for however evil his intention may have been in breaking it, that fact cannot be taken into consideration. Thus, the defendant may have, from motives of annoyance, or even worse motives, refused to pay a debt due until actually compelled to do so, yet all that can be recovered is the amount of the debt, with interest in some cases, which will presently be noticed (d). To this rule, however, there is one exception, viz., an action for breach of promise of marriage, which, though strictly speaking an action on a contract, yet so strongly pertains to a tort, that the motives of the defendant in committing the breach are often a most important point, as also the position in life of the defendant (e). In this action, therefore, the principles stated in the next paragraph will generally apply.

But it is otherwise in actions ex delicto.

In actions of tort, the motives of the defendant in committing the tortious act are, however, all-important, for in such an action any species of aggravation will give ground for additional damages (f). Thus, if two assaults are committed, the one perhaps unintentionally, or at any rate hastily, or with some circumstances of an excusable nature, and the other premeditated and fully intended, and perhaps accompanied with insulting or opprobrious expressions or other circumstances of aggravation, in the latter case very much heavier damages will be given than in the former, although

(c) Mayne on Damages, 84-87.

(d) Ibid. 35.

(e) Ibid.

(f) Ibid. 36.

practically the plaintiff may not have sustained any greater or more substantial injury than in the other cases. Instances might be multiplied to any extent, for almost every action of tort will be found to constitute an instance in itself more or less striking.

A jury, therefore, in assessing damages in tort are governed by far looser principles than in contract (g); and in many cases of tort the jury are justified in giving damages quite beyond any possible injury sustained by the plaintiff, on the ground that the action is brought to a certain extent as a public example, and damages, when so awarded, are styled exemplary or vindictive damages (h). As an instance of this particularly may be mentioned actions for seduction (i).

It was formerly laid down as a rule in actions of tort, that not only must the damage be the natural and probable cause of the defendant's act, but also that the *wrongful* act of a third person, even although it might be the natural and probable cause of the defendant's act, could never be taken into consideration in assessing the damages against the defendant, or, in other words, that damages must be the natural *and legal* consequence of the defendant's act (k). The practical working of this rule may be well illustrated by an extreme case. Suppose that the defendant had slandered the plaintiff openly before a number of people by using words leading them to believe him guilty of some such disgraceful action, that they might naturally have been expected to set upon the plaintiff and ill-use him in consequence of their belief in such words, as

(g) Mayne on Damages, 36.

(h) *Buckle v. Money*, 2 Wils. 205; *Fabrigas v. Mostyn*, 2 W. Bl. 929; *Emblen v. Myers*, 30 L.J. (Ex.) 71; *Bell v. Midland Ry. Co.*, 30 L.J. (C.P.) 273.

(i) Per Wilmot, C.J., in *Tullidge v. Wade*, 3 Wils. 18. As to actions of seduction, see *ante*, pp. 326-332.

(k) *Vicars v. Wilcocks*, 2 S. L. C. 553; 8 East. 1; *Morris v. Langdale*, 2 B. & P. 284.

by putting him in an adjacent pond or otherwise ; and suppose this to have been not only what might have been expected, but also what actually occurred, yet as such an act was of course an unlawful one on the part of such third persons, it could not have been taken into account by the jury in estimating the amount of the damages, as though under the circumstances the natural, it was not the legal consequence of the act (*l*). This former rule was, therefore, manifestly unjust, and must now be taken as clearly not law (*m*).

When interest recoverable.

Provision of 3 & 4 Wm. 4, c. 42, s. 28.

In actions on contract interest may properly be awarded by the jury as increasing the amount of the damages in some cases, though not in all. That this is so in the case of bills of exchange and promissory notes has been noticed in considering those instruments (*n*) ; also, interest may of course be given where there has been an express contract to pay it, or where a contract can be implied to that effect, as from the custom of a banking-house known to the defendant, or where it has been paid in like previous transactions between the parties ; also where a bill or note has been agreed by the defendant to be given for a debt, and not given, the plaintiff may recover interest from the time it ought to have been given, because had it been given it would have itself carried interest (*o*). It has also been provided by statute (*p*), “that upon all debts or sums certain, payable at a certain time or otherwise, the jury, on the trial of any issue, or on any inquisition of damages, may, *if they shall think fit*, allow interest to a creditor at a rate not exceeding the current rate of

(*l*) See per Lord Wensleydale, in *Lynch v. Knight*, 9 H. L. Cas. 577.

(*m*) *Lynch v. Knight*, 9 H. L. Cas. 577 ; *Knight v. Gibbs*, 1 A. & E. 43 ; *Green v. Button*, 2 C. M. & R. 707 ; *Lumley v. Gye*, 22 L. J. (Q.B.) 463 ; (the facts of which latter case are set out, *ante*, p. 331.) Starkie on Slander and Libel, 205 ; notes to *Vicars v. Wilcocks*, 2 S. L. C., 559–567, and cases cited and referred to ; Mayne on Damages, 61, 62.

(*n*) *Ante*, p. 142.

(*o*) Mayne on Damages, 133.

(*p*) 3 & 4 Wm. 4, c. 42.

interest, from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the time of payment. Provided that interest shall be payable in all cases in which it is now payable by law" (q).

It will be observed that this is a mere discretionary power to a jury, and in that respect unlike the other cases in which interest is recoverable. With regard to the demand that is required if the sum is not payable at a certain time under some written instrument, anything is sufficient that substantially gives the defendant notice that if the debt is not paid at a certain time he will be held liable for interest (r). The same Act also provides that the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, give damages in the nature of interest over and above the value of the goods in actions for wrongful conversion or trespass to goods, and also over and above all money recoverable on policies of insurance made after the Act (s).

Observations
on the statute.

Further pro-
visions of same
statute.

There are some few cases in which it has been provided by statute that double or treble damages shall be recoverable, *e.g.*, in the case of a wrongful distraint for rent where no rent was actually due, there the party so wrongfully distraining forfeits double the value of the chattels distrained on, together with full costs of suit (t).

Double and
treble
damages.

(q) 3 & 4 Wm. 4, c. 42, s. 28.

(r) See *Mowatt v. Lord Londesborough*, 23 L. J. (Q.B.) 38.

(s) 3 & 4 Wm. 4, c. 42, s. 29.

(t) 2 Wm. & M. sess. 1, c. 5, s. 5; Addison on Torts, 75.

A defendant may now, under the Judicature Act, 1875, obtain damages against the plaintiff in an action.

A defendant may now in some cases obtain substantial damages against a plaintiff, for the Judicature Act, 1875 (*u*), allows any counter-claim to be set up by a defendant against a plaintiff. In all such cases of course the general rules as to the measure of damages will apply.

3. Damages in some particular cases.

3. Damages in every particular case depend more or less on the general rules as to the measure of damages laid down in the preceding pages.

Damages ordinarily recoverable by a purchaser on breach of a contract to sell land.

Where, on a contract for sale of land, it turns out that the vendor has no valid title to convey to the purchaser, naturally the latter has a right of action against the former, and he is entitled to recover as his damages any expenses he has properly incurred in investigating the title, and also, if he has paid a deposit, such deposit and interest thereon (*x*), but he is not generally entitled to recover anything for expenses incurred purely on his own behalf and not actually necessary, *e.g.*, surveying the estate, nor any expenses he has incurred before the proper time for doing so, *e.g.*, the preparing of the conveyance in anticipation of matters being all right (*y*).

Damages recoverable where vendor knew he had no title.

As no man can be absolutely certain that he has a perfect title to land which he contracts to sell, it is considered that contracts for the sale of land have expressed on them the condition or proviso that they are only to take effect in the event of the vendor turning out to have a good title, and therefore, generally speaking, if the contract is not carried out, through a defect in the title of the vendor, the purchaser is only entitled to the damages specified in the last preceding paragraph (*z*); but if a person has offered for sale an estate to which

(*u*) 38 & 39 Vict. c. 77, Order XIX. r. 3.

(*x*) Mayne on Damages, 168.

(*y*) Ibid. 169.

(*z*) See *Fleureau v. Thornhill*, 2 W. Bl. 1078.

he knew he had no title, and to which he had no reasonable expectation of gaining a title, the purchaser is entitled further to reasonable damages for the loss of his bargain, on the principle that he is entitled, so far as money can effect it, to be placed in the same situation as if the contract had been carried out (a). But the purchaser is not entitled to recover as damages the profit that he would have made on an agreed re-sale of the estate, or any expenses of such re-sale, unless there has been some fraud on the part of the vendor (b).

If the breach of a contract for the sale or letting of land arises from some matter other than title, *e.g.*, if the vendor wilfully refuses to convey or let to the plaintiff, all reasonable special damage that he has under the circumstances sustained may be recovered, so that this would certainly bring in the loss of profit on an agreed re-sale (c). And the plaintiff is also generally entitled, in addition, to specific performance of the contract (d).

Damages recoverable where vendor wilfully refuses to convey.

In an action against a purchaser of land for refusing to complete as he should have done, the damages that the plaintiff is entitled to recover are not the full price agreed to be paid, or the value of the land, but the loss he has actually sustained by the defendant's breach of contract, which would in most cases be the expenses the plaintiff has been put to, and any special inconvenience he has suffered, and the difference between the price agreed upon and the sum produced on a re-sale (e). Under the ordinary stipulation, that, if the purchaser fails to comply with the conditions of sale the deposit shall be forfeited to the vendor, the vendor is entitled to forfeit it on such an event (f); this does not preclude

Damages recoverable against a purchaser for refusing to complete.

(a) *Robinson v. Harman*, 18 L. J. (Ex.) 202.

(b) See Mayne on Damages, 169.

(c) *Engel v. Fitch*, L. R. 4 Q. B. 659.

(d) See Snell's Principles of Equity, 521 *et seq.*

(e) *Laird v. Pym*, 7 M. & W. 474.

(f) *Hinton v. Sparkes*, L. R. 3 C. P. 161.

him from bringing an action against the vendee also, but if he does so the amount of the deposit will be taken into account in calculating the damages (*g*).

Damages recoverable in an action by a reversioner for breach of a covenant to repair.

Where an action is during the continuance of a lease brought by the reversioner for breach of a covenant to repair, the measure of damages is generally considered to be the real injury that has been done to the reversion (*h*); but if the lease has actually expired, then the measure of damages will be what it has cost or will cost to put the premises in proper repair (*i*).

Damages for trespass, &c., to land, may sometimes be recovered, both by the occupier and the reversioner.

In the case of trespass or other injury done to land, the actual occupier of it is naturally the person entitled to bring an action, but if the injury is one of a permanent nature that tends to depreciate the value of the inheritance as well as the immediate ownership, not only may the occupier sue but also the reversioner (*k*), which has been well instanced by the case of injury done to trees where the occupier would have his right of action in respect of the loss of shade from them, and the reversioner for the loss of the timber (*l*).

Mesne profits.

In any action for recovery of land the plaintiff may also recover damages for the loss of the profits of the land during the period of the defendant's wrongful possession, which damages are styled *mesne profits* (*m*).

Damages recoverable against a purchaser of goods for breach of contract.

In the case of a contract for the sale of goods, on the breach of it by the purchaser, the proper measure of damages is the difference between the contract price of the goods and the market value thereof at the time that the contract ought to have been completed (*n*), and

(*g*) *Ockenden v. Henly*, 27 L. J. (Q.B.) 361.

(*h*) *Mayne on Damages*, 229.

(*i*) *Ibid.* 231.

(*k*) *Jesser v. Gifford*, 4 Burr. 2141.

(*l*) See *Bedingfield v. Onslow*, 3 Lev. 209. • See *ante*, pp. 258, 259.

(*m*) Judicature Act, 1875, Order xvii. r. 2; *Brown's Law Dict.* 236.

(*n*) *Philpotts v. Evans*, 5 M. & W. 475.

the best evidence of the market value at that time will be the proof of the re-sale of the goods by the plaintiff and the sum produced by such re-sale. To make the rule plain by an instance, A. agrees to sell certain hops to B. for £100, to be delivered on a certain day, B. refuses to receive them, and by that day the hops, having gone down in the market, are worth only £70; here the sum A. will be entitled to recover against B. will be the difference of £30. If A. has directly after the day re-sold them, and they have produced only the £70, of course this will be all the stronger evidence of the market value. If, however, in this case the hops have gone up in value, here, as the plaintiff will have suffered no substantial harm, he can only recover nominal damages.

But if there is not merely a contract for the sale of goods, but the property in the goods has actually passed to the purchaser (*o*), although they may not have been delivered, here the vendor may recover the full amount of the price agreed to be paid by the purchaser (*p*), unless, indeed, the contract has in any way been of an unconscionable, oppressive, or fraudulent nature, in which case the jury are sometimes allowed to disregard the precise terms of the agreement actually made and to give fair and equitable damages only (*q*).

Where the property in the goods has passed, the full price is recoverable.

On the breach of a contract for the sale of goods by a vendor in not delivering them, the measure of damages is "the difference between the contract price and that which goods of a similar description and quality bore at the time when they ought to have been delivered, because the purchaser has the money in his hands, and might have purchased other goods of a like quality the very day after the contract was broken. Therefore a

Damages recoverable on breach of contract to deliver goods.

(*o*) As to when the property in goods passes, see *ante*, pp. 70-74.

(*p*) *Alexander v. Gardner*, 1 Bing. N. C. 671.

(*q*) Broom's Coms. 619.

buyer *cannot* recover the loss of profit which he would have made by carrying out a contract for re-sale at a higher price made in the interval between the first contract and the time for delivering" (r).

Damages recoverable in cases of breach of warranty.

In actions for the breach of a warranty (s) the measure of damages must depend considerably upon the fact of the article having been returned or not. In previously treating of warranties it has been pointed out that in some cases the vendee has an absolute right to return the article warranted, whilst in other cases he has no *right* to do so, but is confined to his remedies other than this (t). If the vendee, having the right to do so, does return the article, or though not having the right, yet does so with the assent of the vendor, and has not before paid the price, if he has not suffered any special injury he will be entitled to nominal damages only, and if he has paid the price and suffered no injury beyond that, then the measure of damages will be the price paid (u). If any special injury has however resulted, then, in all cases where the article has not been returned, the measure of damages is the difference between the value of the article had it not possessed the defect warranted against but been as it should be, and the actual value of the article with the defect (x); and the best evidence of the value of the article with the defect must necessarily be the sum which it has produced on a re-sale.

Damages recoverable against a carrier of goods.

If a carrier of goods (y) does not deliver them within the proper time, and the consignee therefore

(r) Mayne on Damages, 149; and see cases there cited. See also, as shewing that the general rule may be departed from in some cases through the conduct of the defendant himself, *Ogle v. Earl Vane*, L. R. 2 Q. B. 275; (Ex. Ch.) L. R. 8 Q. B. 272.

(s) As to what will amount to a warranty, see *ante*, p. 84.

(t) See *ante*, p. 86.

(u) Mayne on Damages, 162.

(x) *Dingle v. Hare*, 7 C. B. (N.S.) 145; Mayne on Damages, 162; Broom's Coms. 624.

(y) As to carriers generally, see *ante*, pp. 95-101.

refuses to receive them, or if by the neglect of the carrier they are lost, the damages recoverable will be the true value of the goods, and also any further damages naturally resulting from the contract. What will be deemed the natural consequences of the carrier's neglect has already been sufficiently considered (z).

With regard to actions against a carrier of passengers for some personal injury caused by the defendant's negligence, the measure of damages consists in the substantial injury the plaintiff has suffered by the expenses of his cure, his loss of time and consequent injury to his business, and the general pain and discomfort he has been put to (a), and the fact of the plaintiff having through an insurance received compensation for his accident cannot be set up by the defendant in mitigation of damages (b). With regard to actions under Lord Campbell's Act (c) the rule has been stated to be "that the damages should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise from the continuance of the life" (d), which means that the jury cannot speculate on mere probabilities of advantages that might possibly have ensued to the persons for whose benefit the action is brought, nor can they look to the grief caused such persons by the death, but they may consider the fair loss of comforts and conveniences to such parties through the death, for this is fairly within the pecuniary loss for which the action is brought (e). And in calculating this pecuniary loss the jury may consider any reasonable probabilities of pecuniary benefit capable of being estimated in money, *e.g.*,

Damages recoverable against a carrier of passengers.

Particularly in actions under Lord Campbell's Act.

(z) See *ante*, p. 363, *et seq.*; and case of *Hadley v. Baxendale* there quoted and referred to, and remarks thereon.

(a) *Mayne on Damages*, 404, 405; and see as to how far this principle will be extended, *Armsworth v. South Eastern Ry. Co.*, 11 Jur. 760.

(b) *Yates v. White*, 4 B. N. C. 283.

(c) 9 & 10 Vict. c. 93, as to the provisions of which see *ante*, pp. 339, 340.

(d) *Per cur. Franklin v. South Eastern Ry. Co.*, 3 H. & N. 211.

(e) *Franklin v. South Eastern Ry. Co.*, 3 H. & N. 211.

that the deceased who had been in the habit of contributing towards the support of a relative, for whose benefit the action is brought, would have continued to have done so (*f*). It has been held that the jury cannot give damages in respect of the funeral expenses, there being nothing in the Act to justify their so doing (*g*).

Damages recoverable on fire and life policies.

From the very material distinction in the nature of the contracts of fire and life assurance (*h*) arises the difference in the damages recoverable in each, the damages being in the former only the actual loss incurred, but in the latter the whole sum assured to be paid.

When a plaintiff, though he has not done work as contracted for, may sue upon a *quantum meruit*.

Where a person is employed to do certain work, and he does not do it as he contracted to, but does it in some different way, though he cannot of course recover the contract price, yet if the defendant has accepted what he has done he is entitled to recover upon a *quantum meruit*, i.e., as much as it deserves (*i*).

Damages recoverable in actions for trespass, or other injury to land.

In an action for a trespass or other injury to land, the general measure of damages is the diminished value of the land (*k*); and in cases of trespass where no real injury has been sustained, and there are no special circumstances of aggravation, nominal damages only will be given. If, however, there are any circumstances of aggravation, or the trespass has been committed after notice not to trespass, here exemplary damages may be given quite beyond any real injury that the plaintiff has suffered (*l*).

(*f*) *Dalton v. South Eastern Ry. Co.*, 27 L. J. (C.P.) 227; *Pym v. Great Northern Ry. Co.*, 2 B. & S. 767; 4 B. & S. 396.

(*g*) *Dalton v. South Eastern Ry. Co.*, *supra*.

(*h*) As to which see *ante*, pp. 155, 156.

(*i*) *Ante*, p. 199.

(*k*) *Jones v. Goody*, 8 M. & W. 146.

(*l*) *Merest v. Harvey*, 5 Taunt. 442; as to trespass to land, see *ante*, pp. 256-263.

In cases of nuisances where no substantial injury has been done, if it is the first time of an action having been brought in respect of the nuisance, nominal damages generally will only be given; but if it is a second or any further action for the continuance or re-occurrence of the same nuisance, exemplary damages may be given with a view to compelling its removal (*m*). In any action the plaintiff may also obtain an injunction, either in addition to or instead of damages. Not only the actual occupier of lands, but also the reversioner may obtain damages if the nuisance is of a permanent nature (*n*). .

Damages recoverable in respect of nuisances.

When a reversioner may obtain damages.

In an action for some injury done by a ferocious animal, *e.g.*, a fierce dog, the damages awarded to the plaintiff may include, not only the actual expenses he has been put to in getting cured, but also the bodily pain he has suffered, as by undergoing a surgical operation (*o*).

Damages recoverable by a plaintiff in respect of some injury done by a savage animal.

For the measure of damages in an action for seduction the student is referred to the previous remarks on that subject (*p*).

As to damages in seduction.

In actions for breach of promise of marriage the only rule that can be given is that temperate and reasonable damages should be awarded, the jury fairly considering the grief caused by the breach, and the probable pecuniary or social loss sustained by the plaintiff; but any evil motives of the defendant, or circumstances of aggravation, may be taken into account.

Damages in actions for breach of promise of marriage.

The damages to be awarded the plaintiff in an action for assault and battery (*q*) must always depend on the circumstances of the case. In the case of a simple and

Damages in actions for assault and battery, and false imprisonment.

(*m*) *Battishill v. Reed*, 25 L. J. (C.P.) 290.

(*n*) See as to nuisances, *ante*, pp. 263-268.

(*o*) Addison on Torts, 116, 117. As to injuries by ferocious animals, see *ante*, pp. 279, 280, 336.

(*p*) *Ante*, p. 328.

(*q*) As to which see *ante*, pp. 291-299.

somewhat excusable assault nominal damages only will generally be given, but exemplary damages may be given if there has been any special injury, or the assault has been attended with circumstances of insult, or has been premeditated (*r*). In actions, too, for false imprisonment (*s*), the damages must depend on the same principles (*t*).

Damages recoverable in actions for malicious prosecution.

In actions for malicious prosecution (*u*) damages may be awarded not only in respect of the actual pecuniary loss the plaintiff may have been put to in defending himself, but also in respect of the injury done to his character (*x*).

The statute 6 & 7 Vict. c. 96, may affect the question of damages in actions for libel or slander.

With reference to the damages recoverable in respect of libel or slander, the student is reminded of the effect in some cases of the provisions in the statute 6 & 7 Vict. c. 96, before noticed in treating of those subjects (*y*).

Damages recoverable against a non-attending witness.

The damages recoverable against a witness who has been served with a subpoena, and whose reasonable expenses have been tendered, consist of a penalty of £10, and such further sum as may be awarded for the injury or loss sustained by the party who subpoenaed him (*z*). If, through the non-attendance of the witness, the party gets the trial postponed, the proper measure of damages will be the expenses of going down to the trial and of getting it postponed, and all costs incidental to such postponement.

Damages against a sheriff for negligence in executing a writ of *ca. sa.*

In an action against a sheriff (*a*) for having by his negligence allowed some person arrested by him for

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- (*r*) Mayne on Damages, 402-404.
 - (*s*) As to which see *ante*, pp. 299-307.
 - (*t*) Mayne on Damages, 402-404.
 - (*u*) As to which see *ante*, pp. 308-310.
 - (*x*) Mayne on Damages, 398.
 - (*y*) See *ante*, chap. v., p. 311 *et seq.*
 - (*z*) 5 Eliz. c. 9, s. 12, made perpetual by 26 & 27 Vict. c. 125.
 - (*a*) As to which see *ante*, p. 347.

debt to escape, although formerly the damages recoverable against him were the full amount of the debt, yet this is not always so now, for the measure of damages is the value of the custody of the debtor at the time of his escape, that is, if he was reasonably or probably able to satisfy the debt, the full amount will be awarded, but if he had no means, or very slight means of doing so, then the damages would be very much less. And if the plaintiff has by his conduct prevented the defendant from retaking the debtor, or has in any way aggravated or increased his loss, this will naturally affect the amount to be recovered (b).

So also in an action against a sheriff for negligence Or a writ of in not having levied on goods when he might and *fi. fa.* ought to have done so, the damages recoverable are not necessarily the full amount of the debt for which the levy ought to have been made or the full value of the goods, but the real measure of damages is the benefit that the plaintiff would have probably derived from the levy had it been made (c). Thus, if in such an action it were proved that, had the levy been made, the landlord of the debtor would have distrained for a year's rent (for which he has a claim to be paid in full before any execution), and that this would not have left sufficient for the plaintiff, this will be taken into account. Or again, if the debtor were a trader, and the execution for a sum exceeding £50, so that it would have operated as an act of bankruptcy, and there must therefore have been the possibility of the debtor having been adjudicated bankrupt, and the plaintiff having through it derived no benefit, or very little benefit, from his execution, this will be taken into account in assessing the damages.

(b) *Arden v. Goodacre*, 20 L. J. (C.P.) 184; *Macrae v. Clarke*, 35 L. J. (C.P.) 247; and see also Mayne on Damages, 411, 412.

(c) *Hobson v. Thelluson*, 36 L. J. (Q.B.) 302; L. R. 2 Q. B. 642.

Damages recoverable in an action by a servant for wrongful dismissal.

In an action by a servant for wrongful dismissal (*d*), the measure of damages is obtained "by considering what is the usual rate of wages for the employment contracted for, and what time would be lost before a similar employment could be obtained. The law considers that employment in any ordinary branch of industry can be obtained by a person competent for the place, that the usual rate of wages for such employment can be proved, and further, that when a promise for continuing employment is broken by the master, it is the duty of the servant to use diligence to find another employment. If indeed the particular employment could not be again obtained without delay, and if the wages stipulated for in the contract broken were higher than usual, the damages should be such as to indemnify for the loss of wages during that delay, and for the loss of the excess of wages contracted for above the usual rate," but nothing beyond this (*e*).

(*d*) As to the subject of Master and Servant generally, see *ante*, pp. 169-173.

(*e*) Broom's Coms. 626.

CHAPTER II.

OF EVIDENCE IN CIVIL CASES.

HAVING in the previous pages discussed the different rights that a person has in respect of contracts, and of torts, and the damages to be awarded him in an action in respect of them, there necessarily remains to be considered the important subject of the evidence to be given by a person in our courts in support of the right that he there sets up. The subject may conveniently be considered in the following order:—

Mode of considering the subject.

1. The nature of evidence generally.
2. The competency of witnesses and the admissibility of particular evidence.
3. Cases of privilege.
4. Some miscellaneous points.

I. *As to the nature of evidence generally.* Evidence has been defined as the proof of, or mode of proving, some fact or written document, and in its nature may be direct, or indirect (or, as it is more usually styled, circumstantial), primary or secondary, and there may also be admissions which may serve as evidence (*f*). By direct evidence is meant some positive or conclusive proof; by indirect or circumstantial evidence, some proof from particular circumstance (*g*). The division of direct and indirect (or circumstantial), evidence, more particularly applies to criminal than to civil cases, and as the present work only professes

I. As to the nature of evidence generally.

Direct and indirect evidence.

(*f*) Brown's Law Dict. 144.

(*g*) See Brown's Law Dict. 62, tit. "Circumstantial Evidence."

to treat of civil and not of criminal matters, that division will not be further discussed beyond explaining the distinction by an illustration. As an illustration then, let us take the case of a man prosecuted for murder, the death of the deceased having resulted from a pistol-shot. Proof by some one who saw the prisoner fire the shot will be direct evidence; but if it was not actually seen, but the prisoner was found near the spot with a pistol recently discharged in his hand, and the shot fitted the barrel of the pistol, this would be indirect or circumstantial evidence that he was the murderer.

Primary and
secondary
evidence,

The division of primary and secondary evidence is, however, one that far more particularly affects civil cases, and is therefore here entitled to more consideration.

Difference
between them.

Primary
evidence, when
possible, must
always be
given.

Primary evidence may be defined as the highest kind of evidence which the nature of the case admits of (*h*), and secondary evidence as everything falling short of the best or primary evidence (*i*). Thus, where at a trial it is required to prove a certain contract entered into in writing, the production of that writing itself is the best or primary evidence, and a copy or merely parol evidence of what that contract contained is secondary evidence. It is a rule in every case, that the best or primary evidence must be given (*k*); thus, in our instance of proof required to be given of a contract that has been entered into, if it is in the power of the party requiring to prove it to produce the original contract he must do so, for if he can,

(*h*) Brown's Law Dict. 145.

(*i*) Ibid.

(*k*) Powell's Evidence, 60. It has, however, now been provided by 42 Vict. c. 11 (repealing 39 & 40 Vict. c. 48), with reference to banker's books, that entries therein may be proved by affidavit without production of the books themselves. The student is referred to the Act itself. See also 40 & 41 Vict. c. 26, allowing of copies of certain documents to be given in evidence in the case of companies.

then he is not permitted to give proof of it otherwise than by the very contract itself. "The rule is founded on the presumption that if inferior evidence is offered when evidence of a better and more original nature is attainable, the substitution of the former for the latter arises either from fraud or from gross negligence, which is tantamount to fraud. Thus, if a copy of a deed or will be tendered when the originals exist and are producible, it is reasonable to assume that the person who might have produced the original, but omits to produce it, has some private and interested motive for tendering a copy in its place" (l). Reason of the rule, as stated in Powell on Evidence.

And although a person may not have the best or primary evidence actually in his possession or power, yet if he can by any means cause its production he is bound to do so (m). This is well shewn by the fact that if at the trial of an action one of the parties rests his evidence upon some writing in his opponent's possession, before he can give in evidence a copy of it, or parol evidence of its contents, he must give to the other party a notice to produce the original, and then if it is not produced, having done all in his power to get the best or primary evidence, he is allowed to give his secondary evidence. This notice to produce is practically given before the trial of nearly every action, there generally being some documents in the opponent's possession which the other party considers ought to be laid before the jury (n). And a person, though not having primary evidence in his own possession, must do all he can to obtain it.

There are no degrees of secondary evidence; when a person has done everything he can to get the best or primary evidence, and thus entitled himself to give secondary evidence, it may be of any kind (o). Thus, if There are no degrees of secondary evidence.

(l) Powell's Evidence, 61.

(m) Ibid. 350.

(n) As to the notice to inspect and admit usually given before going to trial, see *post*, pp. 397, 398. See also as to both these notices Indermaur's Manual of Practice, 71, 72.

(o) Powell's Evidence, 62.

an original writing cannot be produced, the party may give as secondary evidence either a copy of it, or parol evidence of its contents, though of course in such a case it would always be preferable to give the copy, as being, from its greater certainty, entitled to more credence.

When a document requiring to be proved is in a third person's possession, a *subpœna duces tecum* must be issued.

Although if a person gives his opponent notice to produce a deed or other document, and this is not done, he may give secondary evidence of its contents, yet if the document is not in that opponent's possession, but in the possession of a third person not a party to the action, here his proper course is to issue a *subpœna duces tecum* for such person to attend and produce it. If on such subpœna the witness wrongfully refuses to produce the deed or document in question, that does not entitle the plaintiff or defendant to give secondary evidence (*p*), unless the witness is a solicitor, when the rule appears to be different (*q*).

Definition of hearsay evidence.

Another kind of evidence that is sometimes allowed to be given is hearsay evidence, which has been well defined or described as some "oral or written statement of a person who is not produced in court, conveyed to the court either by a witness or by the instrumentality of a document" (*r*). If a person appears in court and himself on oath deposes to a certain fact, this evidence is at first hand, but if a witness appears and deposes that a person told him a certain fact, or if a writing by some person stating a fact is produced, this is only at second hand, and is hearsay evidence.

Reason of hearsay evidence not being generally admitted.

The general rule as to hearsay evidence is that it is not admissible, upon the ground that it really is not on oath at all, and therefore is not entitled to credibility (*s*); so that a witness stating that he was told such and

(*p*) *Jesus College v. Gibbs*, 1 Y. & C. 156.

(*q*) *Hibberd v. Knight*, 2 Ex. 11.

(*r*) *Powell's Evidence*, 137.

(*s*) *Ibid.*; *Doe d. Didsbury v. Thomas*, 2 S. L. C. 518; 14 East, 323.

such a fact is at once stopped, and not allowed further to proceed with that testimony. In some cases, however, hearsay evidence is, contrary to the general rule, admitted, apparently upon the principle that were it not, no possible proof of the matters could be given, and the following are the chief cases in which it is so admitted:—

1. It is admitted in matters of public or general interest, though not in any matter of merely private right (*t*). Here the fact of a popular reputation or opinion upon the matter, or a statement made by some deceased person of competent knowledge, *before any dispute arose*, may be given in evidence, the particular reason for it being that matters of public and general interest are usually of a very ancient date, and consequently there is a great difficulty in obtaining direct testimony as to their existence, and also because a general reputation, in a matter in which many are interested, existing when there was no dispute as to that right, is likely to be true (*u*). Thus traditional reputation of boundaries between two parishes may be given in evidence, for this is a matter of public and general interest to the persons dwelling there (*x*). But it must be clearly borne in mind that this case of the admissibility of hearsay evidence does not extend to cases of merely private rights; thus evidence of reputation of a boundary between two estates has been rejected because it is a matter which only affects the respective owners (*y*).

2. In questions of pedigree hearsay evidence is sometimes admitted (*z*). Here, if no better proof can be found, evidence may be given of the common reputation

(*t*) Powell's Evidence, 151 *et seq.*

(*u*) 2 S. L. C. 525, 526.

(*x*) See note to *Doe d. Didsbury v. Thomas*, 14 East, 331.

(*y*) *Ibid.*

(*z*) Powell's Evidence, 174 *et seq.*

in the family, or of the declaration of any deceased relatives; thus common reputation in a family to prove who was the ancestor of a member of it is admissible, or to prove how many children that ancestor had (*a*), and in a case where it was desired to prove that a member of the family had not been married, Lord Ellenborough said, what other proof could the plaintiff be expected to produce that such person had not been married, than that none of the family had ever heard that he was (*b*)? Under this head, too, entries in old family bibles or in prayer books have been held admissible in evidence (*c*), as also has a genealogy made by a deceased member of the family (*d*), and inscriptions on tombstones (*e*).

But a declaration under this head must be from a relative by blood or marriage.

It is important to observe that the declaration made by a person under this head must have been made by a relative either by blood or marriage, and if made by another, though much connected with the family, this is not sufficient, and a person illegitimate is not considered as a relation (*f*). The person whose declaration or statement is tendered must be proved to be dead, otherwise his declaration cannot be admitted (*g*), but it is not necessary that the declaration should have been made at the same time as the event happened (*h*).

Where in an action the direct issue between the parties is a question as to some tolerably recent matter of pedigree, hearsay evidence is not admitted, but strict proof is necessary (*i*).

(*a*) Bull. N. P. 294, cited 15 East, 294, n.

(*b*) *Doe d. Banning v. Griffin*, 15 East, 293.

(*c*) See *Berkeley Peerage Case*, 4 Camp. 401; *Sussex Peerage Case*, 11 Cl. & Fin. 85.

(*d*) *Monkton v. Attorney-General*, 2 Russ. & M. 147.

(*e*) *Haslam v. Crow*, 19 W. R. 969.

(*f*) Powell's Evidence, 175, and cases there cited.

(*g*) *Butler v. Mountgarret*, 7 H. L. C. 733.

(*h*) *Monkton v. Attorney-General*, *supra*.

(*i*) *Berkeley Peerage Case*, *supra*.

3. Hearsay evidence is admissible when it forms part of the actual transaction (*res gestæ*) which forms the subject-matter of the action. Thus, in an action for assault and battery, words or expressions of intention made use of by the defendant at the time of committing an assault may be given in evidence (*k*), and where in the action the legitimacy of the plaintiff was in issue, a witness was allowed to state the declaration and conduct of the deceased mother when questioned as to the parentage of the child (*l*).

3. In cases where it forms part of the *res gestæ*.

4. General evidence affecting a person's character or reputation is admissible (*m*).

4. In matters affecting a person's reputation.

5. A declaration by a deceased person who had a competent knowledge of a fact, and no interest to pervert it, and which declaration was against the pecuniary or proprietary interest of the declarant at the time when it was made, is evidence between third parties of everything stated in the declaration (*n*).

5. In the case of an entry made against a person's pecuniary or proprietary interest.

The leading case upon this principle is that of *Higham v. Ridgway* (*o*). In that case it was necessary to prove the precise date of the birth of one William Fowden, and to prove this an entry made by a man-midwife (since deceased), who had delivered the mother, of his having done so on a certain day, and referring to his ledger, in which he had made a charge for his attendance, *which was marked as paid*, was tendered in evidence. It was decided that, though it was of course no testimony on oath, yet it could be received, because the fact of the entry of payment made it an entry against the pecuniary interest of the party.

Higham v. Ridgway.

(*k*) See hereon Powell's Evidence, 143-146.

(*l*) *Hargrave v. Hargrave*, 2 C. & K. 701. It may be mentioned that this third instance of hearsay evidence is not treated as hearsay in Powell on Evidence, but it has been thought better to treat it so here.

(*m*) Powell's Evidence, 147.

(*n*) Ibid. 194, 195.

(*o*) 2 S. L. C. 331; 1 East, 109.

It will be noticed that in this case the portion of the entry that was really required as evidence, viz., the fact of the delivery of the mother of the child, was not at all against the party's interest; the part that was against his interest was the acknowledgment of the payment of the charge for attendance. The case therefore fully shews that it is quite sufficient for any part of an entry to be against a person's interest to render the whole of it admissible in evidence (*p*). On this point there is an important distinction between this and the case that will be next mentioned (*q*). Although the case of *Higham v. Ridgway* only goes to entries against a person's *pecuniary* interest, yet the rule equally applies where the entry is against a *proprietary* interest, but the interest must be either of a pecuniary or proprietary character (*r*).

An entry, however, against interest, which entry also forms the only evidence of that interest, is not admissible.

Where, however, an entry against interest is also the only evidence of the existence of the interest against which it tends, it has been decided that the entry is not admissible (*s*). Thus, to refer again to the case of *Higham v. Ridgway*, had there been no evidence that the man-midwife had actually attended the woman other than his own entry, it seems that the entry could not have been admitted in evidence, but there was in that case other ample proof of the attendance (*t*).

In the case of an entry falling under the rule as being an admission against interest, proof of the handwriting of the party, and his death, is enough to authorize its reception; at whatever time it was made it is admissible (*u*).

(*p*) See also per Pollock, C.B., *Percival v. Nanson*, 7 Ex. 1.

(*q*) See *post*, p. 389.

(*r*) 2 S. L. C. 344; per Cockburn, C.J., *Reg v. Birmingham*, 1 B. & S. 768.

(*s*) *Doe d. Gallop v. Voules*, 1 M. & Rob. 261.

(*t*) See generally hereon *Sussex Peerage Case*, 11 C. & F. 85.

(*u*) Per Parke, B., *Doe v. Turford*, 3 B. & A. 898.

6. A declaration made by a person strictly in the course of his trade or duty, and without any apparent interest on his part to misrepresent the truth, if contemporaneous with the fact, is evidence after his death against third persons (x).

6. In the case of an entry made in the course of business in discharge of a duty.

The leading case upon this principle is that of *Price v. Earl of Torrington* (y). The plaintiff there was a brewer, and the action was for beer sold and delivered to the defendant. The evidence given to charge the defendant was that the plaintiff's drayman, who had since died, had in the usual course of his business and in discharge of his duty, made and signed a note of the fact of the delivery of the beer in a book kept for that purpose. It was held that this was good evidence and admissible.

Price v. Earl of Torrington.

This class of cases is entirely distinct from that previously mentioned where the entry is admitted as against interest. Here the entry is not at all admitted on that ground, but simply on the ground of duty or course of business; it must also be carefully noted that here, unlike that other class of cases, only so much of the entry is admitted as it was in the course of the person's ordinary duty to make, and no matter in the entry extraneous to this can be admitted (z).

Distinction between this class of cases and the previous one.

In the case of an entry falling under this rule it is essential to prove that it was made at the time it purports to bear date, for it must be a contemporaneous entry (a).

In both this class of cases and that in which the matter is admitted as against interest, it seems that not

Both this and the previous class of cases apply to oral statements as to entries in writing.

(x) Powell's Evidence, 206 *et seq.*

(y) 1 S. L. C. 344; Salkeld, 285.

(z) *Reg. v. Birmingham*, 1 B. & S. 763; see also 1 S. L. C. 346, 347.

(a) Per Parke, J., *Doe v. Turford*, 3 B. & A. 898.

only are statements in writing admitted, but also that any oral statement made by a person against his interest, or in the course of his duty, is also equally admissible (b).

There are also some other cases in which hearsay evidence will be admitted (c), but the foregoing are the chief.

Presumptions
sometimes
furnish
evidence.

Presumption
as to death
after seven
years.

Presumptions also sometimes furnish evidence. Thus it is a rule that where a person goes abroad and is not heard of for seven years, the law presumes the fact that such person is dead, but not that he died at the beginning or the end of any particular period during those seven years (d). This presumption—and, indeed, any presumption of law—is liable to be rebutted, and although, as stated above, there is no presumption of the time of death, such a presumption may arise from particular circumstances. This is, however, purely matter of evidence, and the onus of proving that the death took place at any particular time within the seven years lies upon the person who claims the right to the establishment of which that fact is essential. There is also no presumption of law in favour of the continuance of life, though an inference of fact may legitimately be drawn that a person alive and in health on a certain day was alive a short time afterwards (e).

Deeds, &c.,
are presumed
to have been
executed at
their date.

Deeds and other documents, until the contrary is shewn, are presumed to have been executed or written at the date they bear (f).

(b) See *Sussex Peerage Case*, 11 C. & F. 85; *Stapylton v. Clough*, 2 E. & B. 933; and 2 S. L. C. 345.

(c) See Powell's Evidence, 137-225.

(d) *Nepean v. Doe*, 2 S. L. C. 584; 2 M. & W. 910.

(e) *Wing v. Angrave*, 8 H. of L. Cas. 183; *In re Phene*, L. R. 5 Ch. 139; *Hickman v. Upsall*, L. R. 20 Eq. 136.

(f) Powell's Evidence, 80, 81.

Public records are evidence of their own authenticity, and deeds or wills which are thirty years old, and come from the proper custody, or from that custody in which it was most reasonable to expect to find them, prove themselves (*g*). The thirty years are computed from the date of the instrument, even in the case of a will (*h*). Formerly, the mere statement or recital of some fact in a deed, however old, was not evidence to prove that fact; but it has been provided by the Vendors and Purchasers Act, 1874 (*i*), that in the completion of any contract for sale of land made after the 31st of December, 1874, and subject to any stipulation to the contrary in the contract, recitals, statements, and descriptions of facts, matters and parties contained in deeds, instruments, Acts of Parliament, or statutory declarations twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters and descriptions (*k*).

Deeds and wills, after a lapse of thirty years, and coming from the proper custody, prove themselves.

Provision of Vendors and Purchasers Act, 1874, as to statements or recitals in deeds, &c.

II. *As to the competency of witnesses and the admissibility of particular evidence.*

II. As to the competency of witnesses, &c.

As a general rule, every person is a competent witness in an action.

It was, however, in very early times considered that persons not professing the Christian faith were incompetent as witnesses (*l*), but the contrary was decided in the well-known case of *Omichund v. Barker* (*m*). In that case the question was whether the testimony of witnesses of the Gentoo religion, and sworn according

Omichund v. Barker.

(*g*) Powell's Evidence, 82, 83.

(*h*) *McKenire v. Fraser*, 9 Ves. 5. On presumptive evidence generally, see Powell's Evidence, 66-98.

(*i*) 37 & 38 Vict. c. 78.

(*k*) Sect. 2.

(*l*) See 1 S. L. C. 473.

(*m*) 1 S. L. C. 7th ed., 455 (omitted in 8th ed.); Willes, 538.

Decision of
later cases.

to that religion, was admissible, and after a very full consideration the Court decided, in an elaborate judgment, that it was admissible, and that it was not necessary for a witness to hold the Christian faith, but that when any witness believes in the existence of a God who will punish him in this world, his evidence must be admitted. In later cases, however, it was ruled that belief in a God who will punish in *this* world is *not* sufficient, but that the belief must be in a *future* state of rewards and punishments (*n*).

Provision of
the Evidence
Amendment
Act, 1869.

The law, therefore, until lately was as above, and in so far as the actual taking of an oath is concerned, is so still; but a very important provision has somewhat recently been made, for by the Evidence Amendment Act, 1869 (*o*), it has been provided as follows: "If any person called to give evidence in any court of justice, whether in a civil or criminal proceeding, shall object to take an oath, or shall be objected to as incompetent to take an oath, such person shall, if the presiding judge (*p*) is satisfied that the taking of an oath would have no binding effect on his conscience, make the following promise and declaration: 'I solemnly promise and declare that the evidence given by me to the Court shall be the truth, the whole truth, and nothing but the truth.' And any person who, having made such promise and declaration, shall wilfully and corruptly give false evidence, shall be liable to be indicted, tried, and convicted for perjury, as if he had taken an oath" (*p*).

An atheist can
under this
provision give
evidence.

An atheist, therefore, is under this provision capable of giving evidence, although, not having the necessary religious belief before stated, of course he cannot take an oath.

(*n*) *Reg. v. Taylor, Peake*, 11; *Maden v. Catanach*, 31 L. J. (Ex.) 118.

(*o*) 32 & 33 Vict. c. 68, s. 4.

(*p*) By 33 & 34 Vict. c. 49, this is to extend to any person or persons having by law authority to administer an oath.

Persons who were infamous,—as criminals,—were formerly inadmissible as witnesses, but it is now provided that no person shall be excluded from giving evidence by incapacity from crime (*q*). Any person, therefore, whatever he may have been guilty of, is competent as a witness, and it is for the jury to say to what extent they will credit his testimony. In some cases it may be important to bring before the jury the fact of the witness's crime or bad character, to shew that he is not worthy of credence; and it has been provided that a witness in any cause may be questioned as to whether he has been convicted of any felony or misdemeanor, and upon being so questioned, if he either denies the fact, or refuses to answer, it shall be lawful for the opposite party to prove his conviction (*r*). It is also, irrespective of this enactment, quite open to a party to examine a witness on points affecting his character, or tending to discredit him; but if he deny such points, the evidence of other witnesses to contradict him is not admissible, unless the fact sought to be established is material to the issue (*s*).

Criminals or persons of infamous character were formerly excluded from giving evidence, but are not now.

A party producing a witness, who deposes contrary to what was expected, is not allowed to impeach his credit by general evidence of bad character; but he may, in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony, the circumstances of such statement being first mentioned to him, and he being asked whether or not he has made such statement (*t*), and if, on being so asked, he does not admit that he made such statement, proof may be given that he did (*u*). Where any witness

Contradiction of an adverse witness.

(*q*) 6 & 7 Vict. c. 85, s. 1.

(*r*) 17 & 18 Vict. c. 125, s. 25.

(*s*) See notes in Day's Common Law Procedure Acts to foregoing section.

(*t*) 17 & 18 Vict. c. 125, s. 22.

(*u*) Sect. 23.

has made a previous contrary statement in writing, in cross-examining on it it is not necessary to shew him the writing, but if it is intended afterwards to contradict him by such writing, then, before the contradictory proof can be given, his attention must first be called to those parts of the writing which are to be used for the purpose of so contradicting him (x).

Persons interested in the result of an action were formerly excluded from giving evidence, but not now.

Provision of the Evidence Amendment Act, 1869.

Persons were also formerly excluded from giving evidence if in any way interested in the result of the action, either as parties or otherwise (y), but this is not so now. The first provision on the subject was made by a statute usually called Lord Denman's Act (z), which provided that no person offered as a witness should be thereafter excluded from giving evidence by reason of incapacity from interest, but this was not to extend to render competent any person actually a party to any suit, action, or proceeding (a). By a later Act (b), however, it was provided that even the parties to any action should be both competent and compellable witnesses (c), except in proceedings instituted in consequence of adultery, or in actions of breach of promise of marriage (d). And it has now been provided by the Evidence Amendment Act, 1869 (e), that the parties to any action for breach of promise of marriage shall be competent to give evidence in such action, *provided, however, that no plaintiff in any such action shall recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise* (f): and that the parties to any proceedings instituted in consequence of adultery, and the husbands and wives of such parties, shall be com-

(x) 17 & 18 Vict. c. 125, s. 24.

(y) Powell's Evidence, 35.

(z) 6 & 7 Vict. c. 85.

(a) Sect. 1.

(b) 14 & 15 Vict. c. 99.

(c) Sect. 2.

(d) Sect. 4.

(e) 32 & 33 Vict. c. 68.

(f) Sect. 2.

petent to give evidence in such proceeding; provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to shew that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery (*g*).

Not only were the actual parties to actions excluded from giving evidence, but the rule applied to the husbands and wives of such witnesses (*h*), but this is not so now (*i*). The Act upon this subject, however, also provides that no husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage (*k*).

Husbands and wives of witnesses.

An idiot is incapable of giving evidence (*l*), and so is a lunatic except during a lucid interval, when, if duly proved that it is a lucid interval, he is a perfectly competent witness (*m*).

An idiot cannot give evidence, nor can a lunatic, except during a lucid interval.

A deaf and dumb person is a competent witness through the means of signs, or by an interpreter, if it seems that he has sufficient understanding (*n*).

A deaf and dumb person can give evidence.

(*g*) 32 & 33 Vict. c. 68, s. 3. The student will bear in mind that what is stated above as to parties to proceedings giving evidence is not applicable to criminal law. A prisoner is not capable of giving testimony for himself—of course the prosecutor may. It is however provided by 40 & 41 Vict. c. 14, sect. 1, that on the trial of any indictment or other proceeding for the non-repair of any public highway or bridge, or for a nuisance to any public highway, river, or bridge, and of any other indictment or proceeding instituted for the purpose of trying or enforcing a civil right only, every defendant to such indictment or proceeding, and the wife or husband of such defendant shall be admissible witnesses, and compellable to give evidence.

(*h*) See Powell's Evidence, 46, 47.

(*i*) 16 & 17 Vict. c. 83, s. 2.

(*k*) Sect. 3. See sect. 4 as to criminal cases.

(*l*) Powell's Evidence, 27, 28.

(*m*) Powell's Evidence, 27, 28. The distinction between an idiot and a lunatic is that the former has always, even from his birth, been devoid of understanding, whilst the latter has by some subsequent event been deprived of it; see also *ante*, p. 192.

(*n*) Powell's Evidence, 27, 28.

As to the
testimony
of children.

Children may or may not be competent witnesses, the matter entirely depending upon whether they have sufficient intelligence. "Age is immaterial; and the question is entirely one of intelligence, which, whenever a doubt arises, the Court will ascertain to its own satisfaction by examining the infant on his knowledge of the obligation of an oath, and the religious and secular penalties of perjury. Although tender age is no objection to the infant's competency, he cannot, when wholly destitute of religious education, be made competent by being superficially instructed just before a trial with a view to qualify him. A judge may, in his discretion, postpone a trial in order that a witness may be instructed in the nature of an oath, but the inclination of judges is against this practice" (o).

It has been stated that deeds and other documents thirty years old, and coming from the proper custody, prove themselves (p); in cases when this is not so, it is important to understand the different ways in which they may be proved.

It is not now
necessary to
call on attest-
ing witness to
prove an
instrument
not requiring
attestation.

"It was a common law principle that where a writing was attested, the witnesses, or one of them, must be called to prove the execution of the instrument; and it was not competent to a party to prove it even by the admission of the persons by whom it was executed" (q). The most apt and usual way even now of proving any instrument which has been attested, in the absence of admission, is undoubtedly by calling the attesting witness, but this is not generally now necessary, it having been provided that "it shall not be necessary to prove by the attesting witness any instrument *to the validity of which attestation is not requisite*; and such instrument may be proved by admission or other-

(o) Powell's Evidence, 29.

(p) *Ante*, p. 391.

(q) Powell's Evidence, 357.

wise, as if there had been no attesting witness thereto" (r).

Instruments, therefore, not requiring attestation may be proved in any of the following ways:

Different ways in which such instruments not requiring attestation may be proved.

1. By admission.
2. By calling the attesting witness if there is one.
3. By calling any person who actually saw the writing or signing, or the party who wrote it or signed it himself.
4. By calling a witness who has acquired a knowledge of the writing in question by having seen the person write at some other time, even though only once, or by having had correspondence with such person which has been acted upon.
5. By comparison of the writing in question with any writing proved to the satisfaction of the judge to be genuine (s).

As to the first of the above modes of proof, it may be mentioned that a notice to inspect and admit, *i.e.*, a notice to the other party or parties to the action to inspect some document and admit its execution, is usually given just before the trial of most actions; the other party or parties can then inspect the document, and give an admission, and this saves further proof of execution, and in case of refusal or neglect to admit, the costs of proving the document have to be borne by the party so neglecting or refusing, whatever the result of the action may be, unless at the trial the

Notice to inspect and admit.

(r) 17 & 18 Vict. c. 125, s. 26.

(s) See the notes in Day's Common Law Procedure Acts, prefacing sect. 26 of 17 & 18 Vict. c. 125.

judge certifies that the refusal to admit was reasonable; and no costs of proving any document is allowed, unless such notice has been given, unless in the opinion of the judge the omission to give the notice has been a saving of expense (*t*). The object, therefore, of giving this notice is to get the document admitted, or to throw the expense of its proof on the opponent or opponents (*u*).

Meaning of an admission being made "saving all just exceptions."

Any admission made under such a notice as is last mentioned is made "saving all just exceptions" (*x*), that is, that the party admits nothing more than the bare execution, so that, for instance, the admission by a person of his handwriting to a bill has been held not to preclude him from objecting to its admissibility in evidence on the ground of its being unstamped (*y*).

As to proof by comparison of handwriting.

The last of the before-mentioned modes of proof of handwriting, viz., by comparison with other writings by the same person proved or admitted to be genuine, was not formerly allowed (*z*); the enactment rendering it admissible is the Common Law Procedure Act, 1854 (*a*). Under it experts may be called, quite unconnected with the writer, to prove that by a comparison and a careful observance of the different letters, and the general style, with a document or documents, proved or admitted to be genuine, they are of opinion that the handwriting in question is the work of the same person; this kind of evidence, however, from its manifest uncertainty, has, in several late cases, been somewhat disfavoured. For the purpose of comparison the disputed writing must always be produced in Court,

(*t*) 15 & 16 Vict. c. 76, s. 117.

(*u*) As to the notice to produce usually given before going to trial, see *ante*, p. 383; and as to both notices see Indermaur's Manual of Practice, 71, 72.

(*x*) 15 & 16 Vict. c. 76, s. 117.

(*y*) *Vane v. Whittington*, 2 Dowl. (N.S.) 757.

(*z*) *Doe d. Mudd v. Suckermore*, 5 A. & E. 703.

(*a*) 17 & 18 Vict. c. 125, s. 27.

so that the enactment does not apply to documents which are not produced, and of which it is sought to give secondary evidence (*b*).

But where attestation is necessary to the validity of an instrument, and actual proof is required of it, the attesting witness, or one of the attesting witnesses, if living, must be called as a witness (*c*). The student is reminded that some of the chief instruments requiring attestation are, wills and codicils to wills (*d*), warrants of attorney and cognovits (*e*), powers of appointment, and other instruments which the person giving the power for their execution has stated shall be attested (*f*).

To prove instruments. actually requiring attestation, the attesting witness must be called.

When an attesting witness is dead or abroad, or for some other reason cannot be produced after due efforts to bring him before the Court, evidence of his handwriting must be given, and if there are several attesting witnesses who cannot be produced, generally it is sufficient to prove the handwriting of one of such witnesses (*g*).

Course when the attesting witness is dead or abroad or cannot be found.

Although an attesting witness, on being called to prove the execution, states that he does not remember the actual fact of the execution, but yet deposes that seeing his signature to the attestation he is, therefore, sure he saw the party execute the deed or sign the document, this is quite sufficient proof of the execution of the instrument (*h*).

What it is sufficient for an attesting witness to depose to.

(*b*) See Day's Common Law Procedure Acts, notes to sect. 27 of 17 & 18 Vict. c. 125.

(*c*) *Whyman v. Garth*, 8 Ex. 803.

(*d*) 1 Vict. c. 26, s. 9.

(*e*) 1 & 2 Vict. c. 110, s. 9; 32 & 33 Vict. c. 62, sect. 24, *ante*, pp. 8, 9.

(*f*) As to the execution of powers of appointment by will or deed respectively, see 1 Vict. c. 26, s. 10; and 22 & 23 Vict. c. 35, s. 12.

(*g*) Powell's Evidence, 358.

(*h*) Per Bayley, J., *Maughan v. Hubbard*, 8 B. & C. 16; Powell's Evidence, 359.

Mode of
proving a will
at a trial.

For all ordinary matters probate of a will, or, if lost, an examined copy, or an exemplification, is the proper evidence (*i*). In the case, however, of an action involving the question of title to lands, or any description of realty, it was formerly necessary to produce the original will (*k*), but it has been now provided that in any action, where necessary to establish a devise of or affecting real estate, it shall be lawful for the party intending to establish in proof such devise to give to the opposite party, ten days at least before the trial, notice that he intends at the trial to give in evidence, as proof of the devise, probate of the said will, or administration with the will annexed, or a copy thereof, stamped with any seal of the Probate Court (*l*); and in every such case such probate or letters of administration, or copy thereof respectively, stamped as aforesaid, shall be sufficient evidence of the will and its validity, notwithstanding the same may not have been proved in solemn form, unless the party receiving such notice shall, within four days after such receipt, give notice that he disputes the validity of such devise (*m*). This enactment was intended to prevent expense, it being also provided that where the original will is produced and proved, the Court or judge before whom the evidence is given shall direct which of the parties shall bear the costs thereof (*n*). It has been decided that even in the absence of a counter-notice the probate is only sufficient, or *prima facie* evidence, and that, therefore, the party omitting to give such notice is not, on his part, precluded from giving evidence against the validity of the will (*o*). If the will has been proved in solemn form, it is pro-

(*i*) Powell's Evidence, 328.

(*k*) Ibid. 329.

(*l*) Now the Probate, Divorce and Admiralty Division of the High Court of Justice.

(*m*) 20 & 21 Vict. c. 77, s. 64.

(*n*) Sect. 65.

(*o*) *Barraclough v. Greenhough*, L. R. 2 Q. B. 612.

vided that the probate shall not only be sufficient, but conclusive proof (*p*).

A person is not allowed to make evidence for himself, so that a person's own books are not evidence for him, nor, indeed, is anything written, said, or done by a person having an interest, any evidence for him. This is called self-serving evidence, but many documents and facts, not in themselves evidence, may be admitted to refresh a witness's memory (*q*), for here he speaks to the facts from separate knowledge, only assisted by this extraneous matter; thus, for instance, a witness may refer to his own books of account for this purpose, or to some entry in a diary or other book, and it is not actually necessary that the entry should have been made at the time, but it is sufficient if made shortly afterwards, so that he may be presumed then to have had accurate memory on the point (*r*). And where any memorandum or entry is produced in court to a witness, such memorandum or entry, or so much thereof as is used to refresh the witness's memory, must be shewn to the opponent, who is entitled to cross-examine on it (*s*).

A person is not allowed to make evidence for himself; so, for instance, a man's books are not evidence for him.

Witnesses are required to depose to facts, and not to give forth mere matters of opinion, but, notwithstanding this, there are many cases in which the opinion partakes in its nature of fact, and is, therefore, receivable in evidence. In Mr. Powell's valuable work upon Evidence (*t*) there are stated to be three classes of cases in which evidence consisting of matters of opinion is receivable, viz.:—

There are three classes of cases in which evidence consisting of matters of opinion is receivable.

1. On questions of identification; *e.g.*, in the case of

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- (*p*) 20 & 21 Vict. c. 77, s. 62.
 (*q*) Powell's Evidence, 359-364.
 (*r*) Ibid. 363.
 (*s*) Ibid. 362.
 (*t*) Page 102.

a long-absent claimant to property, or in the case of identification of handwriting.

2. To prove the apparent condition or state of a person or thing; *e.g.*, in the case of an assault, to prove from a person's manner his intention, or to prove the state of some building or of some goods the subject of the action.

3. To prove matters strictly of a professional or scientific character by skilled or scientific witnesses; *e.g.*, in cases of terms having, in some business or amongst a particular class, a special and peculiar meaning, or in cases where words of a scientific or exceptional character are used, or the comparison of handwriting with other handwriting, to tell its genuineness. And not only may a witness be called to prove the meaning of terms or matters in his opinion, but even dictionaries or other books may be referred to. The evidence, however, by experts of matters of opinion is always received with caution, and not a very great degree of weight attached to it (*u*).

An affidavit on an interlocutory application may contain a statement founded on the deponent's belief.

Effect of the non-stamping of an instrument requiring a stamp—time for stamping, &c.

The foregoing remarks of course apply generally, not only to oral evidence, but also to affidavits; but on an interlocutory motion an affidavit may contain a statement founded only on the deponents' belief (*x*).

A document requiring a stamp cannot be given in evidence without one, except to prove some collateral matter, *e.g.*, fraud or illegality. There are some instruments which require to be stamped before execution, *e.g.*, articles of clerkship to a solicitor; but generally, after execution, fourteen days are allowed within which to stamp an agreement, and two months within which to stamp an instrument under seal; and an instrument

(*u*) See per Lord Campbell, 10 Cl. & Fin. 191; and see also *ante*, p. 398.

(*x*) Judicature Act, 1875, Order XXXVII. r. 3.

executed abroad may be stamped within two months after being received in the United Kingdom. If not stamped within these times, the unstamped instrument can only be stamped on payment of the unpaid duty and a penalty of £10, and also, by way of further penalty, where the unpaid duty exceeds £10, of interest on such duty at the rate of £5 per cent. per annum from the day upon which the instrument was first executed up to the time when such interest is equal in amount to the unpaid duty (y).

If an instrument is not stamped, or has been insufficiently stamped, when tendered as evidence, the opponent may object to it on that ground; but, strictly, it is the place of the officer whose duty it is to read the instrument to call the attention of the judge to the fact; and even then, if the instrument is one which may legally be stamped after execution, it may, on payment to such officer of the amount of the unpaid duty and the aforesaid penalty payable on stamping, and also on payment of a further sum of £1, be received in evidence, saving all just exceptions on other grounds (z).

Who objects
to insufficiency
of stamp?

III. *Cases of Privilege*.—It has been pointed out, in discussing the subject of libel and slander, that there are certain circumstances in which a party is privileged to make assertions which in ordinary cases would be libellous or slanderous, but which are from such circumstances prevented from being so (a). So, also, in matters of evidence, generally speaking a witness must answer all questions put to him relating to the subject-matter of the action, or in any way relevant to it; but there are certain cases in which, from special circum-

III. Cases of
privilege.

(y) 33 & 34 Vict. c. 97, s. 15. The Commissioners of Inland Revenue have however, in special cases, power to remit or reduce the penalty on memorial to them.

(z) Sect. 16.

(a) See *ante*, pp. 314, 315.

stances, either the witness is privileged from being obliged to disclose the matter, or some third person has a right to object to his doing so.

There are two chief cases of privilege, viz.:

1. Facts that may tend to criminate.

1. A witness is not compellable to disclose any matter that may tend to criminate himself, or to expose him to a penalty (*b*); and

2. Professional communications.

2. Professional communications between counsel, solicitors, or their clerks, and their clients, made in confidence, cannot be disclosed without the client's consent, nor can a client be compelled to disclose any communication made in confidence to his professional adviser (*c*).

Where a witness claims privilege on the ground that his answer may tend to criminate him, it is submitted that it is for the Court to decide whether it will have that effect.

As to the first case of privilege.—The question at once presents itself, who is to be the person to judge of whether or not a question asked has a tendency to criminate or to expose the witness to a penalty—the person asked the question, or the presiding judge? The *dicta* upon the point are conflicting, some judges having held that, as the witness is obliged to pledge himself that he believes his answer will tend to this effect, he is to be left to exercise his own discretion (*d*); and other judges having held that the witness has not this discretion, but must satisfy the Court that there is a reasonable probability of the question having this effect (*e*). It is submitted that the latter rule is the correct one, for otherwise a witness might, acting on his own discretion, refuse to answer questions upon this ground without the slightest reason for so refusing.

(*b*) Powell's Evidence, 108.

(*c*) Ibid. 118.

(*d*) See per Maule, J., and Jervis, C.J., in *Fisher v. Ronalds*, 12 C. B. 762.

(*e*) *Reg. v. Garbett*, 1 Den. 236; *Reg. v. Boyes*, 1 B. & S. 311; and see per Parke, B., in *Osborne v. London Docks Co.*, 10 Ex. 698.

Where a question is asked a witness which will not actually tend to criminate him or expose him to any penalty, but is yet one the answer to which may tend to degrade him, if it is not actually material to the issue, but merely some point tending to affect his character and thus reduce damages, or to have some other incidental effect, he is not bound to answer it (*f*).

A witness is not always bound to answer a question tending to degrade him.

This first case of privilege has always been wider in equity than at law; for in equity any question the answer to which might subject the witness to any pains or penalties, or to ecclesiastical censure, or a forfeiture of interest, has been held to be within the rule (*g*); and it is presumed that, as the rules of equity are now generally to prevail (*h*), this is now the case in all divisions of the High Court of Justice.

Although there was formerly some doubt on the point at law (*i*), yet in equity there was no doubt that the rule of privilege upon this ground extended not only to a man himself, but also to his wife, so that a wife could not be compelled to answer any question which might expose her husband to such consequences (*k*). And, for the reason mentioned at the end of the last preceding paragraph, it is submitted that there can now be no doubt upon the point in any division of the court.

A wife cannot be compelled to answer a question that may tend to criminate her husband.

A witness cannot object to answer any question upon the mere ground that his answer might expose him to a civil action (*l*).

No privilege by reason that answer might expose witness to a civil action.

A witness may, of course, waive his privilege and answer at his peril, for he is the party concerned, and

A witness may waive his privilege and

(*f*) Powell's Evidence, 117.

(*g*) Ibid.

(*h*) Judicature Act, 1873, s. 25 (11).

(*i*) See Powell's Evidence, 110.

(*k*) *Cartwright v. Green*, 8 Ves. 410.

(*l*) Powell's Evidence, 111.

answer a question tending to criminate him if he chooses.

if he chooses to waive the privilege that the law allows him, there is nothing to prevent his doing so (*m*). There are several cases in which it has been expressly provided by different statutes that a witness cannot refuse to answer questions to which they refer on the ground that the answers would criminate him, but that such answers shall not be used against him in a criminal proceeding arising out of the same transaction (*n*).

In the case of professional communications, the privilege is the client's.

As to the second chief ground of privilege, this is of a very different nature, for in the first case the privilege is always the witness's own, which he may at his option waive, but in this case, where counsel, solicitors, or their clerks are witnesses, the privilege is not theirs, but that of their clients, and it is not in such a case the witness who may waive the privilege, but the client; and if the client does not so waive it, then the witness is not allowed to make any such disclosure (*o*). And for this case of privilege to exist, it is not necessary that the position of solicitor and client should be actually subsisting at the time, it is quite sufficient if it has existed at some past time, and the communication in question took place whilst that relationship existed. This rule of privilege is founded upon principles of public policy, for if some such rule did not exist, no man would know what he was safe in disclosing to his professional adviser (*p*).

In cases of privilege upon this ground, the relationship of solicitor and client need not be existing at the time.

A client also cannot be compelled to disclose confidential communications made to his professional adviser.

The student will observe that part of the rule in this class of cases of privilege is also that a client cannot be compelled to disclose any communication made in confidence to his professional adviser (*q*). This seems to follow naturally, upon the same reasoning, and here, of course, the privilege is that of the witness. This

(*m*) Powell's Evidence, 111.

(*n*) Ibid.

(*o*) *Wilson v. Rastall*, 4 T. R. 759.

(*p*) See, per Lord Brougham, *Bolton v. Corporation of Liverpool*, 1 M. & K. 94.

(*q*) *Ante*, p. 404.

privilege of the client can always be waived by him, and if waived a witness who has objected to answer on the ground of his client's privilege must then answer it.

The client can always waive the privilege.

It seems that a solicitor called upon to produce any document of his client's, must exercise his own discretion as to producing it, and that it is not for the judge to decide whether or not it ought to be produced (r).

It is for a solicitor to decide whether a document he is called on to produce is privileged.

A communication made by a client to his solicitor, not for the purpose of obtaining advice, but for the purpose of obtaining information upon some matter of fact, or for some purpose other than in the ordinary position of solicitor and client, is not within this case of privilege (s).

A communication made to a solicitor, but not for the purpose of obtaining advice, is not within the privilege.

Although some document originally in a solicitor's possession would, had it remained in his possession, have been privileged, yet, if he has parted with it to some other person, although he should not have done so, yet the privilege is gone, and it may be given in evidence by the party into whose possession it has come (t).

A document privileged in a solicitor's hands is not privileged if he parts with it.

This case of privilege does not extend beyond the persons named (u); thus, medical men (x) and clergymen (y) are not within the rule. Some doubts have, however, been thrown out as to the latter (z).

No privilege in the case of medical men and clergymen.

Letters between a country solicitor and his town agents are privileged from production (a); so also are

Communications "without prejudice."

(r) *Volant v. Soyer*, 13 C. B. 231.

(s) See *Powell's Evidence*, 126, and case there referred to.

(t) See *Cleace v. Jones*, 21 L. J. (Ex.) 105.

(u) See *ante*, p. 404.

(x) *Lee v. Hammerton*, 12 W. R. 975.

(y) *Broad v. Pitt*, M. & M. 233.

(z) See *Powell's Evidence*, 129, 130.

(a) *Catt v. Turle*, 19 W. R. 56.

all communications in or with reference to litigation which are expressed to be "without prejudice."

Some other cases of privilege.

In addition to the foregoing may be mentioned two other cases of privilege, which however, are of much less importance in civil proceedings than the two chief cases that have been given. The first is, that a witness cannot be asked, and will not be allowed to state, any facts, or to produce any documents, the disclosure of which may be prejudicial to any public interest (*b*), *e.g.*, in the case of some high documents of state. The second is, that evidence may sometimes be excluded in a civil case on the ground of indecency (*c*): but the indecency must be something of a very exceptional character, as tending to outrage all conventional propriety, or involving some matter particularly affecting domestic morality. It may, however, be safely stated that this rule is of such a very fine nature as to be practically of very little importance, or, indeed, of no importance at all.

IV. Miscellaneous points on the law of evidence.

IV. *Of some miscellaneous points on the law of evidence.*

The *onus probandi* is on the person asserting the affirmative in an action.

In any action the *onus probandi*, or burden of proof, is on the person who asserts the affirmative side of the question (*d*), that is to say, that any person who asserts a fact is bound to prove that fact to succeed in his case, and it is not necessary for the person alleging the negative to prove it in the first instance, and it is therefore at a trial generally for the person on whom lies the affirmative to begin. In all cases, by the affirmative is not merely meant the affirmative in point of form, but the affirmative in substance, and the true test for determining on whom the affirmative lies is

(*b*) Powell's Evidence, 131.

(*c*) Ibid. 136.

(*d*) See Brown's Law Dict. 260, tit. "Onus probandi."

this: If no evidence was offered, who would be unsuccessful in the action? It is for the party who would be unsuccessful in such event to commence (e).

Instances without number to illustrate the foregoing remarks can be easily given. Thus, take an ordinary action for goods sold and delivered: here, if the defendant in his statement of defence denies the selling and delivery, or otherwise puts the question in issue, did the plaintiff offer no evidence, the verdict would be for the defendant, so here the *onus probandi* lies on the plaintiff; but if the defendant admits the selling and delivery of the goods, but sets up some counter-claim against the plaintiff in the nature of set-off, here, did he (the defendant) give no evidence, the verdict would be for the plaintiff, so here the *onus probandi* lies on the defendant.

An instance of this.

But there are numerous cases in which, in consequence of presumptions of the law, the *onus probandi* lies on the party on whom it would not lie but for such presumption. Thus, in an action on any ordinary, simple contract, it is for the plaintiff to prove that the essentials of a simple contract exist, unless the contract is admitted by the defendant (f); but as bills of exchange and promissory notes are presumed to have been given for a valuable consideration until the contrary is shewn (g), here it lies on the party who denies the consideration to prove his denial. It is, however, sufficient for a defendant to prove something in the nature of fraud in the prior dealings with the instrument; and if he does this, the plaintiff is then bound to shew how he became possessed of it (h).

But sometimes a presumption of the law puts the *onus probandi* where it would not otherwise be.

Again, where a person takes an interest under a

As to the case of a voluntary settlement.

(e) *Amos v. Hughes*, 1 M. & Rob. 464.

(f) As to what are the essentials of a simple contract, see *ante*, p. 27.

(g) See *ante*, p. 143.

(h) *Smith v. Braine*, 16 Q. B. 244.

voluntary settlement, or any other voluntary instrument, and proceedings are instituted to set aside or otherwise question his interest thereunder, the burden of proof lies on the defendant to prove that such voluntary instrument was fairly and honestly made, without any fraud or pressure upon his part, and if he stood in a fiduciary capacity toward the person making such voluntary instrument, he must, in addition, shew how the intention to make it was produced in the other person (i).

A child born during wedlock is presumed to be legitimate until the contrary is shewn.

A child born during wedlock is presumed to be legitimate, and the burden of proof lies on the party who denies his legitimacy (k). There are also many other cases in which the presumption of the law puts the *onus probandi* where it would not be but for that presumption, but to go into them is beyond the scope of the present work (l).

Right to begin in actions for personal injuries, &c.

It has already been stated that the person on whom the affirmative lies has the right to begin (m), but it has long been an established rule at law that in actions of libel, slander, and in respect of other personal injuries, or indeed in any action where the plaintiff seeks to recover actual damages of an unascertained amount, he is entitled to begin, although the affirmative of the issue may in point of form be with the defendant.

Leading questions are not allowed in an examination in chief.

Leading questions cannot be put to a witness by the person on whose behalf he is called (n). By a "leading question" is meant some question put or framed in such a form as to suggest to the witness the answer that is desired (o). Thus, if at a trial it is

(i) Per Lord Eldon, *Gibson v. Jeyes*, 6 Ves. 266; *Hoghton v. Hoghton*, 15 Beav. 299; *Cooke v. Lamotte*, 15 Beav. 234.

(k) *Banbury Peerage Case*, 1 S. & S. 155.

(l) See some in Powell's Evidence, 291 *et seq.*

(m) *Ante*, pp. 408, 409.

(n) Powell's Evidence, 449.

(o) Brown's Law Dict. 209.

desired to elicit from a witness the effect of a certain conversation, the proper way to put the question is to simply ask the witness what then took place, or to that effect, and it is not allowable to state in the question the conversation and ask the witness if it did not take place; for this would be a leading question (*p*). The reason of the rule prohibiting leading questions must be apparent to all; and it has been well stated in Mr. Powell's work on Evidence (*q*) to be "because the object of calling witnesses and examining them *vivâ voce* in open court, is that the judge and jury may hear them tell their own unvarnished tale of the circumstances which they are called to attest."

In cross-examination of a witness, however, or even in examination in chief of an adverse witness, leading questions may be asked, for the reason of such question not being admitted in the evidence in chief is because the witness is presumed to be desirous of assisting the person for whom he is called to give evidence, but in cross-examination, or in the examination in chief of an adverse witness, there can be no such presumption, and the reason for the rule failing, it does not apply.

Aliter in cross-examination or in examination in chief of an adverse witness.

If when an action is called on for trial the plaintiff appears, and the defendant does not, the plaintiff does not necessarily have judgment, but he may prove his claim so far as the burden of proof lies on him (*r*); and if when an action is called on for trial the defendant appears, and the plaintiff does not appear, the defendant, if he has no counter-claim, is entitled to judgment dismissing the action, but if he has a counter-claim, then he may prove such claim so far as the burden of proof lies on him (*s*); but any verdict or

Position of a plaintiff or defendant if his opponent does not appear at the trial.

(*p*) See an instance of a leading question in a criminal case in Powell's Evidence, 450.

(*q*) Page 449.

(*r*) Judicature Act, 1875, Order xxxvi. r. 18.

(*s*) Ibid., rule 19.

judgment obtained where one party does not appear at the trial may be set aside by the Court or a judge upon such terms as he may see fit, upon an application made within six days after the trial (t).

Admissions may do away with the necessity of strict evidence.

Admissions between the parties to an action may frequently do away with the necessity that would otherwise exist for strict evidence. The term "admissions" is here used to denote the mutual concessions which the parties to an action make in the course of their pleadings, and the effect of which is to narrow the area of facts or allegations requiring to be proved by evidence (u). The most usual case of admissions that occurs in ordinary actions is the admission of documents under a notice to inspect and admit, which has already been noticed (x); but there may be many other cases of admissions, *e.g.*, admissions of facts not only in any pleading, but in any letter of one of the parties, or of his solicitor or agent, unless such letter has been expressed to have been written "without prejudice." It is therefore usual and proper, in any letter written with a view to the compromise of an action, to state that it is written "without prejudice;" but when any letter has been written with such a statement then all subsequent letters following thereon are within the rule although not so expressed (y).

Effect in one action of an admission made in another action.

If an admission is made in some pleading in one action, that pleading can be given in evidence in another action as a cogent admission on his part, especially if it has been put in on oath, as would be the case in an answer to interrogatories (z).

Admissions may be by parol or by conduct, &c.

An admission need not necessarily be in writing, but

(t) Ibid., rule 20. See hereon Indermaur's Manual of Practice, Part II. ch. 5.

(u) Brown's Law Dict. 15.

(x) *Ante*, pp. 397, 398.

(y) *Hoghton v. Hoghton*, 15 Beav. 278.

(z) *Fleet v. Perrins*, L. R. 1 Q. B. 536.

it may be by parol; *e.g.*, in the course of conversation, and acts, conduct, manner, demeanour, and acquiescence may operate as admissions if they can be so fairly construed (*a*).

Counsel may at a trial bind their clients by any admission they in their discretion see fit to make (*b*).
 An agent can only bind his principal by admissions when the making of such admissions comes within the scope of his ordinary and usual authority (*c*); and a wife can only bind her husband by her admissions so far as she can be said to have his authority, express or implied, to do so (*d*), so that even in an action against a husband for his wife's tort, her admission of it cannot be given in evidence against him (*e*).

Effect of admissions by counsel, agents, &c.

An infant cannot make admissions, nor generally can his guardian or next friend do so for him (*f*).

Admissions when they exist are as good as any primary evidence.

Interrogatories are frequently used as a means to obtain admissions from the opponent in an action (*g*).
 Interrogatories may be defined as a set of questions

Interrogatories.

(*a*) Powell's Evidence, 247.

(*b*) See *Swinfen v. Swinfen*, 18 C. B. 485.

(*c*) This is simply on the ordinary principle of the power of an agent to bind his principal, as to which see *ante*, pp. 106, 107.

(*d*) This, again, is on the ordinary principle of the power of the wife to bind her husband, as to which see *ante*, pp. 186 *et seq.*

(*e*) *Dean v. White*, 7 T. R. 112.

(*f*) Powell's Evidence, 262.

(*g*) It is not meant by this that the object of interrogatories is to obtain admissions, for this is not so, the rule as to their object being correctly stated by Mr. Griffith, in his notes to Order XXXI. of the Judicature Act, 1875 (see Griffith's Judicature Acts, 311), as follows: "The object of interrogatories is to afford to the interrogator information upon matters peculiarly within the knowledge of the party interrogated, which may assist the interrogator in making his case; not to try the cause on admissions of the party interrogated, or to break down the case set up by him." But, although this is so, yet, incidentally, of course, admissions are obtained from the party interrogated, and practically, this is often the chief object of the interrogatories.

administered by either a plaintiff or defendant to his opponent in the course of an action before trial, which he (the opponent) is required to answer upon oath. It was always the practice in Chancery to administer interrogatories, and nearly anything was allowed to be asked in them, and by the Common Law Procedure Act, 1854 (*h*), interrogatories were also allowed to be administered at common law by leave of a judge. By the Rules to the Judicature Act, 1875 (*i*), it is now provided that "the plaintiff may at the time of delivering his statement of claim, or at any subsequent time not later than the close of the pleadings, and a defendant may at the time of delivering his defence, or at any subsequent time not later than the close of the pleadings, without any order for that purpose, and either party may at any time by leave of the Court or a judge deliver interrogatories in writing for the examination of the opposite party or parties, or any one or more of such parties, with a note at the foot thereof stating which of such interrogatories each of such persons is required to answer; provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose." It may, however, be noticed that it is the practice of the Court to discourage the delivery of interrogatories unless actually necessary (*k*).

Effect of
payment into
court in an
action.

Payment into court also operates as an admission by the defendant to a certain extent. Formerly a defendant could generally only pay money into court when a fixed liquidated sum was sued for (*l*); but now it is provided that in *any* action to recover a debt *or damages* the defendant may at any time after service of the writ, and before or at the time of delivering his

(*h*) 17 & 18 Vict. c. 125, s. 51.

(*i*) Order XXXI. r. 1.

(*k*) See hereon Indermaur's Manual of Practice, 60, 61.

(*l*) See however as to payment into court in cases of libel, *ante*, pp. 319, 320.

defence, or by leave of the Court or a judge at any later time, pay into court a sum of money by way of satisfaction or amends (*m*).

As under the old system of pleading the plaintiff might declare simply generally, as for goods sold and delivered, without stating any particular date, or might declare on some special contract, there was a difference in the effect of payment into court. Where the declaration was simply general (*n*) the effect was only to admit that the plaintiff had a cause of action to the amount paid in upon some contract, so that it was still necessary for the plaintiff to prove the actual contract, but in the other case, *i.e.*, where the plaintiff declared on some special contract, the payment into court admitted that very contract and a liability on it to that extent (*o*). Under the new practice, however, where a statement of claim has been delivered, this distinction it is presumed cannot exist any longer, as all material facts, dates, &c., are stated in it, which puts the plaintiff's statement of claim in the same position always as a former declaration on a special contract, and payment into court now in such a case will operate as an admission on the contract specified, and of a liability thereon to the extent of the amount paid in.

So also if the payment into court is made before the statement of claim has been delivered, if in the indorsement on the writ the particular contract is mentioned, the payment in will have the same effect, but if the indorsement on the writ is simply general in its nature, then the payment into court will only admit a liability to that extent on some contract, leaving it for the plaintiff to prove the contract as formerly on a general declaration.

(*m*) Judicature Act, 1875, Order xxx. r. 1; Indermaur's Manual of Practice, 58, 59.

(*n*) That is to say, in cases of the ordinary *indebitatus* counts.

(*o*) See Arch. Nisi Prius, 119; Chit. Arch. 1371.

An admission may occur by not denying an allegation contained in any pleading.

“Every allegation of fact in any pleading in an action, not being a petition or summons, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant, lunatic, or person of unsound mind not so found by inquisition” (*p*).

Former distinction in the mode of taking evidence at common law and in Chancery. Provisions of the Judicature Act, 1875, Order xxxvii. r. 1.

There has always been a great distinction between the mode of taking evidence at Common Law and in Chancery. At Common Law it was taken *vivâ voce* in court on the hearing of the cause, but in Chancery it was generally by affidavit (*q*). Now, however, under the Judicature Act, 1875, Order xxxvii. r. 1, in all divisions of the court, in the absence of an agreement between the parties to take the evidence by affidavit, the witnesses at the trial of any action, or at any assessment of damages, are to be examined *vivâ voce* in open court, but the Court or a judge may order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read. It is also provided that upon any motion, petition, or summons evidence may be given by affidavit; but the Court or a judge may, on the application of either party, order the attendance, for cross-examination, of the person making any such affidavit (*r*).

The attendance of a witness at a trial is procured by *subpœna*.

The attendance of a witness at a trial to give evidence is procured by *subpœna*, which is a writ by which a person is commanded to appear at a certain time and place (*s*). When the oral testimony only of a witness is required, the *subpœna* issued is called a *subpœna ad testificandum*; when he is required to pro-

(*p*) Judicature Act, 1875, Order xix. r. 17.

(*q*) There might, however, have been a *vivâ voce* examination by consent or direction of the Court or a judge. See 15 & 16 Vict. c. 86; Order v., Feb. 1861, rules 3 and 10; Daniel's Chancery Practice, 799.

(*r*) Order xxxvii. r. 2. As to the practice when the parties consent to take the evidence by affidavit, see Order xxxviii. See also Indermaur's Manual of Practice, 94, 95.

(*s*) See Brown's Law Dict. 345.

duce any documents it is called a *subpoena duces tecum*. A witness must be paid with his subpoena his reasonable expenses, and if a material witness, having been so served, does not duly attend, he is liable to an action (t) or to be attached for contempt of court in not obeying the subpoena.

The evidence of a witness resident in India, or any other of her Majesty's dominions abroad, is obtained by applying to the Court for a *mandamus* to the tribunals there to examine the witness, and such examination, upon being returned, is allowed and read, and deemed good evidence (u). How evidence procured when a witness resides abroad in one of our colonies,

If in an action here a witness resides in Ireland or Scotland, a subpoena cannot be issued against him as of course, but the Court or a judge has power, on application made for that purpose, to allow a subpoena to issue (x). or in Ireland or Scotland,

In cases of a witness being abroad not in her Majesty's dominions, the only mode of getting his evidence, if he cannot attend, is by issuing a commission for his examination, by which a certain person or certain persons are delegated to take his evidence (y). If on such commission the witness refuses or neglects to attend to be examined, the commissioner or commissioners may, after written notice requiring his attendance, apply to the local courts there for an order to compel his attendance (z). or, where abroad, not in one of our colonies.

If a witness is too ill to attend at the trial, or, if from age or other infirmity he is unable to do so without great danger to himself, or is about to leave the country, so that his evidence may possibly be lost, the Where a witness cannot attend at the trial, his evidence may be taken before an examiner.

(t) As to the damages recoverable in such a case, see *ante*, p. 378.

(u) See 13 Geo. 3, c. 63, s. 44, and 1 Wm. 4, c. 22.

(x) 17 & 18 Vict. c. 34, s. 1.

(y) See Powell's Evidence, 441.

(z) 6 & 7 Vict. c. 82, s. 5.

party desiring his evidence may apply to the Court or a judge for his examination, either before one of the official examiners of the court or some special examiner to be appointed (a). The Court has, indeed, a very wide power as to depositions now, the 4th rule of Order xxxvii. of the Judicature Act, 1875, being as follows: "The Court or a judge may, in any cause or matter where it shall appear necessary for the purposes of justice, make any order for the examination upon oath, before any officer of the court, or any other person or persons, and at any place, of any witness or person, and may order any deposition so taken to be filed in the court, and may empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the court or judge may direct."

When a deposition by a deceased witness in a former trial may be read.

In a matter between the *same* parties on the *same* issue, as on a former trial the depositions of a witness at such former trial may be used if he be dead or cannot be found, or has been subpoenaed and fallen ill on the way (b). The reason why the trial must be between the same parties, is that a person who was not a party to the former action has had no opportunity of cross-examining the witness (c).

It is for the judge to decide on the admissibility of evidence; but it is for the jury to decide on the credence to be given to it.

We have seen in the foregoing pages that there are many kinds of proof that may be tendered that cannot or ought not to be received. It is for the presiding judge to determine as to the admissibility of particular evidence. There is also another and a still more important point, viz., as to the credence to be given to a witness, for very often evidence of a most conflicting character is given at a trial. It is for the jury to decide on the point of credence, for they sit to try the facts of the case, and in exercising their judgment

(a) Judicature Act, 1875, Order xxxvii. rr. 1 and 4.

(b) Powell's Evidence, 217.

(c) Ibid.

they should regard the whole circumstances connected with a witness, they should look to his demeanour and see whether he appears to be giving his evidence in an honest, straightforward, and true manner, and whether he appears to be an over-zealous witness, unduly anxious to befriend the party on whose behalf he is called, in which case he must be regarded with, at any rate, some suspicion. They should look, also, in cases of conflicting evidence, not only to outward circumstances, but to inner matters, and consider any interest or possible motive that the witness may have that may tend to weaken his evidence, and look even to his general character and past doings as some criterion on the all-important question of truth.

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